

Supervising Discretion: An Interest-Based Proposal for Expanded Writ Review of § 1404(a) Transfer of Venue Orders

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I. INTRODUCTION

“We’ve been sued where? By whom?” Not pleased by the news reported by the voice on the other end of the line, Riley Clinton, Assistant General Counsel for McAfee, Inc., leaned back in his chair and began to think through his options while Will Daniels, McAfee’s outside patent counsel, continued. The details of the new lawsuit interrupted Riley’s private strategy session.

“What! You’ve got to be kidding me. They were incorporated when?” McAfee had just been sued in a federal court in West Virginia by Information Protection and Authentication of West Virginia—a “patent troll,” as they are affectionately referred to in the patent world, established just weeks prior to the filing of the present suit.¹

“What’s their angle in West Virginia? They’ve never hit us there before. We don’t have anything there: no documents, no facilities, no people, nothing.” Riley thought aloud, “They’re probably shopping; looking for the next rocket docket. What do we know about the judges in the district? Nothing? Really?”

“Okay, fine. Find out what you can about the judges, but in the meantime, let’s make a motion to transfer venue to either the Northern District of Texas or the Northern District of California. Will, we have no business in a West Virginia court. Making trips to Charleston isn’t my idea of a vacation. If our motion is denied, will *Volkswagen* help us in the Fourth Circuit?”²

“I’m not sure. The law on this is all screwed up. I’ll look into it and get back to you,” replied Will.

“Alright,” sighed Riley. “Let’s just make this go away as quickly as possible.” Riley hung up, rubbed his temples, and hoped Will could find something to get them out of West Virginia.³

¹ A “patent troll” is “a small company who enforces patent rights against accused infringers in an attempt to collect licensing fees, but does not manufacture products or supply services based on the patents in question.” *InternetAd Sys., LLC v. Opodo, Ltd.*, 481 F. Supp. 2d 596, 601 (N.D. Tex. 2007).

² *In re Volkswagen of America (Volkswagen II)*, Inc. 545 F.3d 304 (5th Cir. 2008) (en banc).

³ This fact pattern is loosely based on the case of *Information Protection and Authentication of West Virginia, LLC v. McAfee, Inc.*. The case was a patent infringement suit filed in the Southern District of West Virginia. McAfee did make a motion to transfer venue to the Northern District of California under § 1404(a), the motion was granted, and the case was subsequently dismissed with prejudice. The names of the attorneys have been changed. *See* Order of Dismissal with Prejudice, Info. Prot. and Authentication of W. Va., LLC v. McAfee, Inc., No. 5:09CV05421 (N.D. Cal. Feb. 9, 2010).

Conversations like the one between Riley and Will frequently take place in the opening stages of civil cases, and choices made in these early conversations may prove to be among the most significant decisions in the life cycle of the lawsuit. The pre-trial disputes at the center of these early choices dominate modern litigation because few civil cases are tried.⁴ The vast majority of cases settle—or are adjudicated by non-trial methods—long before a jury is empanelled.⁵

Venue disputes are particularly significant and bitter, and any litigator worth his or her salt will tell you that where a case is litigated is crucial to the success or failure of the action.⁶ In a civil case, the plaintiff makes the initial

⁴ From 1962 to 2002 the percentage of federal civil cases that ended in a trial plummeted from 11.5 percent to 1.8 percent. See ROBERT P. BURNS, *THE DEATH OF THE AMERICAN TRIAL* 82 (2009). See generally Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004). Regarding the extinction of the trial, legal historian Lawrence Friedman has commented that “[t]he trial as the normal way to deal with litigation, especially civil litigation, was doomed to decline, and perhaps even vanish, and probably nothing can stop the process.” See Lawrence M. Friedman, *The Day Before Trials Vanished*, 1 J. EMPIRICAL LEGAL STUD. 689, 703 (2004).

⁵ See generally Gillian K. Hadfield, *Where Have All the Trials Gone? Settlements, NonTrial Adjudications and Statistical Artifacts in the Changing Disposition of Federal Civil Cases*, 1 J. EMPIRICAL LEGAL STUD. 705 (2004) (analyzing the decline in the American civil trial by investigating the “disposition” coding of the Administrative Office of the United States Courts in order to determine how the cases filed are disposed of if not by trial).

⁶ Venue in the federal courts is determined by 28 U.S.C. § 1391 (2006). Change of venue is generally governed by 28 U.S.C. § 1404(a). On the importance of venue see Christopher D. Cameron & Kevin R. Johnson, *Death of a Salesman? Forum Shopping and Outcome Determination Under International Shoe*, 28 U.C. DAVIS L. REV. 769, 776–77 (1995) (“[A]s suggested by the old adage about the ‘home-field advantage,’ the location of the forum adjudicating a dispute is critically important. Litigators are well aware of the careful maneuvering over *where* a lawsuit will proceed and believe—rightly or wrongly—that the answer to the ‘where’ question may drastically impact the ultimate outcome of the case.”); Kevin M. Clermont & Theodore Eisenberg, *Exorcising the Evil of Forum-Shopping*, 80 CORNELL L. REV. 1507, 1511–12 (1995) (observing, based on empirical evidence, that the location of litigation is influential in the outcome of that litigation); see also Harold G. Maier & Thomas R. McCoy, *A Unifying Theory for Judicial Jurisdiction and Choice of Law*, 39 AM. J. COMP. L. 249, 252–55 (1991) (arguing the importance of forum on the outcome of the case including that “[o]nce it is conceded that a forum has judicial jurisdiction, that forum unavoidably controls or determines the result in that case between the parties before it.”); Frederic X. Shadley & Linda E. Maichl, *The Jurisdictional Aspects of Litigation Involving International Clients*, 45 FED. INS. & CORP. COUNS. Q. 113, 141 (1995) (“[T]he forum chosen may have a substantial impact on the outcome of the litigation.”). But see Bruce Posnak, *The Court Doesn’t Know Its Asahi From Its Wortman: A Critical View of the Constitutional Constraints on Jurisdiction and Choice of Law*, 41 SYRACUSE L. REV. 875, 876–79, 899

decision to place the case in a particular forum.⁷ Forum is a strategic choice, and an early misstep could cost the plaintiff his case.⁸ Because plaintiffs will choose the forum most beneficial to them, the defendant may respond with a motion for change of venue. Parties vigorously contest motions for transfer of venue because the defendant is attempting to overcome the plaintiff's original choice of venue thus depriving the plaintiff of some perceived advantage.⁹ And, "[v]enue is worth fighting over because outcome often turns on forum. When the dust settles, the case does too—but on terms that reflect the results of the skirmishing."¹⁰ Thus, though a change of venue is theoretically "but a change of courtrooms," clearly, something more—potentially the outcome of the case—is at stake when a motion to transfer is filed.¹¹

With disputes over venue being such an important aspect of pretrial litigation, one would assume that judicial decisions regarding venue, like other important judicial decisions in litigation, are subject to appellate review. And they are—sort of.

& n.130 (1990) (suggesting that the choice of law is more outcome-determinative than the jurisdictional decision).

⁷ See FED. R. CIV. P. 3.

⁸ Consider, for example, a hypothetical case involving a client who suffers serious injury when she slips and falls on a wet surface inside a restaurant in Miami, Florida. The client is from Ohio and wishes to sue the restaurant for her injuries. Further, assume that the client wishes to invoke the diversity jurisdiction of the federal courts. In which federal court should the lawsuit be brought? A mistake in choosing the forum at this point in the case could be outcome determinative. Under Florida law, plaintiffs in slip-and-fall lawsuits bear a lower burden of proof than plaintiffs in other states, including Ohio, and therefore because the federal court in Florida, under *Erie*, would apply state tort law, the lawsuit should be brought in Florida in order to take advantage of the lower burden. Compare *Owens v. Publix Supermarkets, Inc.*, 802 So. 2d. 315, 331 (Fla. 2001) (eliminating the specific requirement that the plaintiff establish that the business had constructive knowledge of the existence of a foreign substance on the floor in order to state a prima facie case), with *Orndorff v. ALDI, Inc.*, 685 N.E.2d 1298, 1300 (Ohio Ct. App. 1996) (noting that in slip-and-fall cases plaintiffs must prove that the defendant either placed a hazardous substance on the floor or had actual or constructive knowledge of its presence); see also AMERICAN TORT REFORM FOUNDATION, JUDICIAL HELLHOLES 2009/2010 at iii, http://judicialhellholes.org/wp-content/uploads/2010/11/2010_report.pdf (last visited Feb. 25, 2011) (naming South Florida as the number four "judicial hellhole" for defendants).

⁹ *Clermont & Eisenberg*, *supra* note 6, at 1514 ("The most powerful explanation for the transfer effect involves forum-shopping: the plaintiffs' win rate declines because the plaintiff has lost a forum advantage.").

¹⁰ *Id.* at 1508.

¹¹ *Van Dusen v. Barrack*, 376 U.S. 612, 639 (1964).

Judicial decisions on motions to transfer venue are interlocutory in nature and therefore, by definition, not immediately appealable.¹² Though some circuits may allow review of a district court's disposition on a transfer motion through the discretionary interlocutory review provided by 28 U.S.C. § 1292(b),¹³ such review is uncommon because lower courts rarely seek review of their own discretion.¹⁴ Mandamus, therefore, provides the only meaningful review of a trial court's ruling on a transfer motion.¹⁵

Mandamus is an extreme remedy,¹⁶ and the propriety of using this mechanism to review transfer orders is disputed.¹⁷ In some instances, mandamus review of transfer orders is unobjectionable; the review is conducted, and the writ issues with little fanfare. For example, when a district judge acts beyond the scope of her jurisdiction in ruling on the motion, the issuance of a writ of mandamus to constrain the judge to her

¹² See *In re Federal-Mogul Global, Inc.*, 300 F.3d 368, 378 (3d Cir. 2002) ("It is a well-established rule in this circuit (and generally) that orders transferring venue are not immediately appealable.") (internal quotation marks omitted).

¹³ See 28 U.S.C. § 1292(b) (2006) (allowing discretionary review of interlocutory orders where the district judge is "of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation . . .").

¹⁴ See Charles J. Roedersheimer, Recent Cases, *Federal Civil Procedure—Change of Venue—Mandamus To Appeal Denial of Transfer Order Refused*, 35 U. CIN. L. REV. 115, 117 (1966); see also Comment, *Discretionary Appeals of District Court Interlocutory Orders: A Guided Tour Through Section 1292(b) of the Judicial Code*, 69 YALE L.J. 333, 346 (1959).

¹⁵ "Meaningful review" is distinguished here from "any review" because it is possible and permissible to appeal a transfer ruling upon final judgment. See, e.g., *Action Indus. v. U.S. Fidelity & Guar. Co.*, 358 F.3d 337, 340 (5th Cir. 2004). However, appeal from final judgment has very little potential to succeed. In *In re National Presto Industries*, Judge Posner implied that, in almost all cases, appeal from an "adverse final judgment" would be futile because the petitioner "would not be able to show that it would have won the case had it been tried in a [different] forum." See *In re Nat'l Presto Indus.*, 347 F.3d 662, 663 (7th Cir. 2003); see also *Kasey v. Molybdenum Corp. of Am.*, 408 F.2d 16, 20 (9th Cir. 1969) ("Alternatively, and perhaps more persuasively, it may be that the abuse [of discretion on a transfer order] is not susceptible to correction on appeal and, by postponing review, courts are denying effective appeal."); Note, *Appealability of 1404(a) Orders: Mandamus Misapplied*, 67 YALE L.J. 122, 124 (1957) (arguing that appeal of a § 1404(a) ruling upon final judgment does not provide litigants with adequate protection).

¹⁶ See *Kerr v. U.S. Dist. Ct. for N. Dist. of Cal.*, 426 U.S. 394, 402 (1976) ("The remedy of mandamus is a drastic one."); *Will v. United States*, 389 U.S. 90, 107 (1967) ("The preemptory common-law writs are among the most potent weapons in the judicial arsenal.").

¹⁷ See *infra* note 94 and accompanying text.

jurisdiction is uncontroversial.¹⁸ However, mandamus jurisprudence allows the writ to issue not only when the district judge has “usurped power,” but also when she has clearly abused her discretion.¹⁹ There is sharp disagreement within the circuits regarding whether and to what extent mandamus review may be called upon to review a district judge’s discretionary decision to grant or deny a motion to transfer venue.²⁰ The law on this point exists in a state of chaos, leaving an important—and possibly outcome-determinative—judicial decision in the litigation process subject to haphazard and inconsistent review.

The 1948 enactment of the transfer statute generated much debate in the 1950s and early 1960s over whether mandamus was available to review transfer orders for abuse of discretion.²¹ The conversation waned, however, after a line of Supreme Court decisions counseled for restrictive use of the mandamus power, and many of the circuit courts adopted conservative, yet different, standards regarding the availability and use of mandamus.²² For over fifty years the issue existed in a state of settled disarray. A recent string of cases from the Fifth Circuit, and a series of rulings from the Federal Circuit applying the reasoning of the Fifth Circuit, however, departed from the conservative norm, issued mandamus to remedy a district court’s abuse of discretion on a § 1404(a) transfer order, and once again made this question one of modern relevance.²³

Moreover, whether circuit courts may review the discretion of district courts exercised on § 1404(a) motions with mandamus significantly

¹⁸ See *infra* note 93 and accompanying text.

¹⁹ See *Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 380–81 (2004).

²⁰ 15 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, *FEDERAL PRACTICE & PROCEDURE* § 3855 (3d. ed. 2007).

²¹ See, e.g., *In re Josephson*, 218 F.2d 174, 176–77 (1st Cir. 1954); *All States Freight, Inc. v. Modarelli*, 196 F.2d 1010, 1011 (3d Cir. 1952); *Ford Motor Co. v. Ryan*, 182 F.2d 329, 330 (2d Cir. 1950); A. James Roberts III, Comment, *Mandamus Proceedings in the Federal Courts of Appeals: A Compromise With Finality*, 52 CAL. L. REV. 1036, 1036–39 (1964). See generally Note, *supra* note 15.

²² The line of Supreme Court cases referred to began with *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957), and included *Schlagenhauf v. Holder*, 379 U.S. 104 (1964), and *Will v. United States*, 389 U.S. 90 (1967); see also Roedersheimer, *supra* note 14, at 119 (noting that the writ of mandamus, while it had been issued previously, had not been issued to correct an abuse of discretion on a transfer order since the Supreme Court’s decision in *La Buy*).

²³ See, e.g., *In re Genentech, Inc.*, 566 F.3d 1338, 1341 (Fed. Cir. 2009); *In re Hoffmann-La Roche, Inc.*, 587 F.3d 1333, 1336 (Fed. Cir. 2009); *In re Nintendo Co.*, 589 F.3d 1194, 1197 (Fed. Cir. 2009); *In re TS Tech USA Corp.*, 551 F.3d 1315, 1319 (Fed. Cir. 2009); *Volkswagen II*, 545 F.3d 304, 308–09 (5th Cir. 2008) (en banc); *In re Horseshoe Entm’t*, 337 F.3d 429, 432 (5th Cir. 2003).

influences a substantial number of cases in the federal system.²⁴ Precise records revealing the number of transfer motions filed each year or the percentage of cases in which transfer motions are filed do not exist.²⁵ However, “research suggests that transfer motions are filed in a small but sizeable and stable number of [] cases” and “transfer motions appear to constitute a sizeable portion of the federal district court docket.”²⁶ Professors Eisenberg and Clermont conducted the most thorough study of § 1404(a) transfer motions to date and concluded, in part, that the number of transfer motions filed each year is increasing, and that that increase is “part of a gentle long-term upward trend” that may indicate an increased need for § 1404(a)’s mechanism.²⁷ Thus, whether the dispositions on the substantial number of transfer motions filed each year may be reviewed for abuse of discretion by way of mandamus in the circuit courts, and if so, the scope and standard of that review, will have an impact on the federal courts that is not insignificant.

This Note proposes that, although the law in the circuits regarding whether and to what extent a circuit court may avail itself of mandamus in order to review a transfer order entered under § 1404(a) may appear to be chaotic, the decisions in which the writ has issued in review of such orders contain threads of similarity—the protection of five identifiable interests. Based on these mandamus-provoking circumstances, this Note proposes statutory language providing for trans-jurisdictional mandamus review when the ruling of a district court implicates one or more of the identified interests or a similarly important interest.

Part II of this Note briefly considers the legislative history of, and jurisprudence regarding, 28 U.S.C. § 1404(a) and the All Writs Act, 28 U.S.C. § 1651.²⁸ Section 1404(a) empowers district courts to transfer cases to

²⁴ See Brief of Civil Procedure Law Professors as Amici Curiae in Support of the Petition for a Writ of Certiorari at 12, *Richard Singleton v. Volkswagen of Am., Inc.*, 129 S. Ct. 1336 (2009) (No. 08-745) [hereinafter Brief of Civil Procedure Law Professors] (whether mandamus is available to review transfer orders for abuse of discretion “has the potential to impact any case in which a transfer motion is filed”).

²⁵ *Id.*

²⁶ *Id.* at 12, 13.

²⁷ See Clermont & Eisenberg, *supra* note 6, at 1526. Professors Eisenberg and Clermont used data regarding the number of cases terminated in a given year that arrived at the district court by way of transfer from another district combined with their estimated success rate for transfer motions, and estimated that “roughly ten thousand” transfer motions are filed each year. *Id.* at 1529. Another estimate reveals that the number of transfer motions filed each year may be as high as 11,571. See Brief of Civil Procedure Law Professors, *supra* note 24, at 13.

²⁸ See discussion *infra* Part II.

other district courts,²⁹ and § 1651 cloaks the circuit courts with the power to review the decisions of the district courts in limited circumstances including when they transfer cases to other districts.³⁰ Additionally, Part II introduces the considerable confusion regarding the circuit court's ability to review transfer decisions of district courts made under § 1404(a) for abuse of discretion by way of their mandamus power conferred in the All Writs Act.

Part III of this Note examines the decisions in which circuit courts have issued a writ of mandamus to correct a district court's abuse of discretion on a transfer order issued under § 1404(a), and identifies a measure of coherence previously unnoticed in those decisions by identifying five common interests that repeatedly appear to trigger the issuance of the writ.³¹

Because the circuit courts have demonstrated their willingness to protect the interests identified as "triggering events" in Part III, Part IV proposes statutory language that would provide trans-jurisdictional review of § 1404(a) orders for abuse of discretion when one or more of the identified interests, or similarly valuable interests, are jeopardized by a district court's transfer motion ruling.³²

II. BACKGROUND

A. 28 U.S.C. § 1404(a)

28 U.S.C. § 1404 is the main transfer of venue statute in the United States Code.³³ The subsection relevant here, § 1404(a), states in its entirety: "For the convenience of parties and witnesses, in the interest of justice, a

²⁹ 28 U.S.C. § 1404(a) (2006).

³⁰ 28 U.S.C. § 1651 (2006); *Caleshu v. Wangelin*, 549 F.2d 93, 96 (8th Cir. 1977) ("The use of the mandamus power conferred on this Court by the All Writs Statute, 28 U.S.C. § 1651, is a proper remedy to correct an erroneous transfer.").

³¹ See discussion *infra* Part III.

³² See discussion *infra* Part IV.

³³ See 15 WRIGHT, MILLER & COOPER, *supra* note 20, § 3842. It is appropriate to note that while § 1404(a) is the main transfer of venue provision, there are others. See, e.g., 28 U.S.C. §§ 1406, 1407, 1631 (2006). For example, § 1406 addresses the situation where venue has been laid improperly and instructs the district court to either dismiss the suit, or, if transfer is "in the interest of justice," to transfer the case to a proper venue. 28 U.S.C. § 1406(a) (2006). A question regarding whether mandamus is appropriate to review transfer orders issued under § 1406(a), rather than under § 1404(a), also exists. See generally Carolyn Kelly MacWilliam, *Mandamus, Prohibition, or Interlocutory Appeal as Proper Remedy to Seek Review of District Court's Disposition of Motion for Change of Venue Under § 1404(a) or § 1406(a) of Judicial Code*, 28 A.L.R. FED. 2d 311 (2008). That question, though related to the present inquiry, is distinct from it, and this Note addresses only the § 1404(a) question. See *id.* § 19 (noting distinctions between § 1404(a) and § 1406(a)).

district court may transfer any civil action to any other district or division where it might have been brought.”³⁴

Section 1404(a)’s provision of a method for transferring an action from a federal district with proper venue to another, more convenient, federal district was novel at the time of its enactment.³⁵ Prior to § 1404(a), a federal court had the option of employing the doctrine of *forum non conveniens* to dismiss a suit brought in a proper, but inconvenient, district, but had no mechanism with which to transfer a case to a more appropriate venue while retaining it in the federal system.³⁶ Some commentators argue that a transfer provision would have served little purpose prior to 1948 due to “the narrow interpretation of personal jurisdiction embraced in the late nineteenth century” which typically limited a plaintiff to “bring[ing] suit only in the defendant’s state of domicile” thereby precluding plaintiffs from filing in an inconvenient forum.³⁷

The Supreme Court’s 1945 decision in *International Shoe Co. v. Washington* created the need for a transfer of venue statute as the Court moved away from *Pennoyer*’s traditional notion of personal jurisdiction to the now familiar “minimum contacts” analysis.³⁸ With the ability to secure personal jurisdiction over a defendant in any forum with which the defendant had minimum contacts came the risk that plaintiffs would initiate litigation in distant forums with “few connections with the parties or the underlying

³⁴ 28 U.S.C. § 1404(a).

³⁵ See 15 WRIGHT, MILLER & COOPER, *supra* note 20, § 3841.

³⁶ See *id.*; see also *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 512 (1947) (In a negligence action initiated in a federal court in New York by a Virginia citizen against a Pennsylvania corporation doing business in both New York and Virginia, the New York court did not abuse its discretion for dismissing the action under *forum non conveniens* where the jurisdiction of the New York court was based only on diversity of citizenship and the case had no meaningful contacts with New York.).

³⁷ See David E. Steinberg, *The Motion to Transfer and the Interests of Justice*, 66 NOTRE DAME L. REV. 443, 448 (1990); see also *Pennoyer v. Neff*, 95 U.S. 714, 722–23 (1877). The most prominent exception to the rule of personal jurisdiction in *Pennoyer* allowed personal jurisdiction over non-residents physically present in the forum state at the time they were served with process. See Steinberg, *supra*, at 448 n.18; cf. *Burnham v. Superior Court*, 495 U.S. 604, 634 (1990) (Brennan, J., concurring) (“For much of the 19th century, American courts did not uniformly recognize the concept of transient jurisdiction . . .”).

³⁸ See *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (“[D]ue process requires only that in order to subject a defendant to a judgment in personam, if he not be present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’”) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

dispute” in an effort to obtain a quick settlement or to take advantage of a “unique legal doctrine.”³⁹

Baltimore & Ohio Railroad v. Kepner, “which was prosecuted under the Federal Employers’ Liability Act (FELA) in New York, although the accident occurred and the employee resided in Ohio,”⁴⁰ typifies the harassment made possible by the expansion of personal jurisdiction.⁴¹ *Kepner* antedates *International Shoe*,⁴² but the plaintiff had the ability to bring suit in a distant venue, as he would under *International Shoe*’s minimum contacts test, under the special venue provision of FELA.⁴³ The plaintiff thus filed suit against the railroad in New York because the railroad was “doing business in the New York district where the damage suit was filed”⁴⁴

The railroad sought to enjoin the prosecution of the New York case in an Ohio state court.⁴⁵ The Ohio court refused to enjoin the plaintiff, and both the Supreme Court of Ohio and the United States Supreme Court subsequently affirmed their decision.⁴⁶ In support of its holding, the Supreme Court wrote:

The real contention of petitioner [railroad] is that despite the admitted venue, respondent is acting in a vexatious and inequitable manner in maintaining the federal court suit in a distant jurisdiction when a convenient and suitable forum is at respondent’s doorstep But the federal courts have felt they could not interfere with suits in far federal districts where the inequity alleged was based only on inconvenience.⁴⁷

Thus, under FELA, and later, *International Shoe*, a plaintiff, acting in a “vexatious” manner could file suit in a distant forum in order to harass the

³⁹ See Steinberg, *supra* note 37, at 449.

⁴⁰ 28 U.S.C. § 1404(a) (2006) (Historical and Revision Notes).

⁴¹ See *Baltimore & Ohio R.R. v. Kepner*, 314 U.S. 44 (1941) (cited in § 1404 Reviser’s Note as illustrating the need for a transfer provision); see also Steinberg, *supra* note 37, at 449. A number of prominent commentators have viewed *Kepner* as an example of the harassment available due to expanded personal jurisdiction. See, e.g., J. MOORE, MOORE’S JUDICIAL CODE COMMENTARY 205–06 (1949); Robert Braucher, *The Inconvenient Federal Forum*, 60 HARV. L. REV. 908, 933–35 (1947).

⁴² *Kepner* is a 1941 case, and *International Shoe* did not expand personal jurisdiction until 1945. *Int’l Shoe*, 326 U.S. at 316.

⁴³ See 45 U.S.C. § 56 (2006); see also *Kepner*, 314 U.S. at 49 (noting that under the FELA venue statute an action may be brought in a federal court in the district where the defendant resided, in which the cause of action arose, or in any district where the defendant is doing business when the action is commenced).

⁴⁴ *Kepner*, 314 U.S. at 48.

⁴⁵ *Id.*

⁴⁶ *Id.* at 48–49, 54.

⁴⁷ *Id.* at 51, 53.

defendant, and the defendant had little chance of being released from the inconvenient forum.⁴⁸

In response to *Kepner*, the development of the doctrine of forum non conveniens, “which authorized dismissal of a suit where another court would provide a more convenient forum,” quickly developed.⁴⁹ However, the doctrine of forum non conveniens had the potential to work great prejudice against a plaintiff if, while the plaintiff was litigating her forum non conveniens motion, the relevant statute of limitations expired thereby stranding the plaintiff with no court to hear her case.⁵⁰ As a result of this hazard, “[f]orum non conveniens dismissals [] were . . . not favored, and courts often declined to grant such motions.”⁵¹ Thus, the need for a transfer of venue statute had matured, and the enactment of § 1404(a) met the need.

Very little legislative history accompanied § 1404(a); the meager Reviser’s Note—which is not particularly helpful—is the main source.⁵² According to the Note, § 1404(a) was “drafted in accordance with the doctrine of forum non conveniens . . . [and], [t]he new subsection requires the court to determine that the transfer is necessary for convenience of the parties and witnesses, and further, that it is in the interest of justice to do so.”⁵³ The absence of a definitive Congressional expression regarding the purpose of

⁴⁸ *Id.*; see also Steinberg, *supra* note 37, at 449–51.

⁴⁹ Steinberg, *supra* note 37, at 449; see *Koster v. Lumbermens Mutual Co.*, 330 U.S. 518 (1947).

⁵⁰ See *All States Freight v. Modarelli*, 196 F.2d 1010, 1011 (1952) (“The *forum non conveniens* doctrine is quite different from Section 1404(a). That doctrine involves the dismissal of a case because the forum chosen by the plaintiff is so completely inappropriate and inconvenient that it is better to stop the litigation in the place where brought and let it start all over again somewhere else. It is quite naturally subject to careful limitation for it not only denies the plaintiff the generally accorded privilege of bringing an action where he chooses, but makes it possible for him to lose out completely, through the running of the statute of limitations in the forum finally deemed appropriate.”); see also Steinberg, *supra* note 37, at 450.

⁵¹ *Id.* at 450–51 (footnotes omitted).

⁵² See 28 U.S.C. § 1404(a) (Historical and Revision Notes); see also *Ferens v. John Deere Co.*, 494 U.S. 516, 523 (1990) (noting the “scant” legislative history of § 1404(a)); Steinberg, *supra* note 37, at 452 (commenting that, other than the Reviser’s Note, “[v]ery little additional legislative history discusses the transfer statute”).

⁵³ 28 U.S.C. § 1404(a) (Historical and Revision Notes).

Although the new code was not enacted until several months after the Supreme Court’s adoption of the forum non conveniens doctrine in *Gulf Oil Corp. v. Gilbert*, the transfer provision had been proposed several years before. In a creative bit of retroactive legislative history, annotations to section 1404 refer to it as a codification of the forum non conveniens doctrine.

Allan R. Stein, *Forum Non Conveniens and the Redundancy of Court-Access Doctrine*, 133 U. PA. L. REV. 781, 807 (1985) (footnotes omitted).

§ 1404(a) has led the courts to weigh in on the matter; one district court in Oklahoma has expressed the commonly accepted view that “[t]he purpose of § 1404(a) is to prevent the waste of time, energy and money and to protect litigants, witnesses and the public against unnecessary inconvenience and expense.”⁵⁴

Under § 1404(a), the district court must balance a number of factors, and in its discretion determine whether the movant has demonstrated that the conveniences of the parties and witnesses and the interests of justice will be served by transferring the action to another venue.⁵⁵ This decision is inherently discretionary, and the facts of each case will determine the outcome of the motion.⁵⁶ As one court has noted, “[w]isely it has not been attempted to catalogue the circumstances which will justify or require grant or denial of transfer. Given the statutory standards the decision is left to the sound discretion of the court.”⁵⁷

Statements from the federal courts are not uniform regarding which factors should be balanced in the transfer analysis: some courts limit themselves to the factors that would be considered on a motion to dismiss for forum non conveniens, others consider a “wide variety of other factors;” some courts divide the factors into *Gulf Oil*’s public and private categories,⁵⁸ and some do not.⁵⁹ However, the diverse factors considered by district courts

⁵⁴ Pope v. Mo. Pac. R.R. Co., 446 F. Supp. 447, 449 (W.D. Okla. 1978); see also Ferens v. John Deere Co., 494 U.S. 516, 516–17 (1990); Van Dusen v. Barrack, 376 U.S. 612, 616 (1964).

⁵⁵ See 15 WRIGHT, MILLER & COOPER, *supra* note 20, § 3847 (“[M]uch necessarily must turn on the particular facts of each case and . . . the trial court must consider and balance all the relevant factors to determine whether or not the litigation would proceed more conveniently and the interests of justice be better served by transfer to a different forum . . .”).

⁵⁶ Van Dusen, 376 U.S. at 622 (The purpose of the statute is the “individualized, case-by-case consideration of convenience and fairness . . .”) (internal quotation marks omitted); SEC v. Savoy Indus., 587 F.2d 1149, 1154 (D.C. Cir. 1978) (“[T]he proper technique to be employed is a factually analytical, case-by-case determination of convenience and fairness.”).

⁵⁷ Brown v. Woodring, 174 F. Supp. 640, 644 (M.D. Pa. 1959).

⁵⁸ See Pro Edge, L.P. v. Gue, 374 F. Supp. 2d 711, 755 (N.D. Iowa 2005) (equating § 1404(a) transfer with “transfer on forum non conveniens grounds,” and harvesting the transfer factors from the Supreme Court’s *Gulf Oil* and *Piper Aircraft* forum non conveniens decisions).

⁵⁹ See Decker Coal Co. v. Commonwealth Edison Co., 805 F.2d 834, 843 (9th Cir. 1986) (“This statute partially displaces the common law doctrine of *forum non conveniens*. Nonetheless, *forum non conveniens* considerations are helpful in deciding a § 1404 transfer motion.” (internal citation omitted)). For an extensive circuit-by-circuit list of the factors considered by district courts on a § 1404(a) motion see 15 WRIGHT, MILLER & COOPER, *supra* note 20, § 3847 n.13.

on transfer motions do not defeat the courts' "commonality of analysis."⁶⁰ The analysis of the court always turns on whether or not the conveniences of the parties and witnesses and the interests of justice will be furthered by transfer.⁶¹

The Supreme Court has done little to clarify this area of the law, and one commentator notes, "Supreme Court review of transfer motions has occurred rarely and has proven unilluminating."⁶² In fact, the Supreme Court decision most influential on § 1404(a) came not from a case directly considering the statute, but from a *forum non conveniens* case: *Gulf Oil Corp. v. Gilbert*.⁶³ In *Gulf Oil*, one of the questions decided by the Court was "whether the United States District Court has inherent power to dismiss a suit pursuant to the doctrine of *forum non conveniens*"⁶⁴ The Court held that the district court did have the power to dismiss a suit on *forum non conveniens* grounds, and commented that "[t]he doctrine leaves much to the discretion of the court to which plaintiff resorts"⁶⁵ In the course of its opinion the Court set out a number of considerations, both private and public in nature, that the district court should balance in the exercise of its discretion.⁶⁶

Many of the Court's decisions expressly considering § 1404(a) have simply, in line with the policy of *Gulf Oil*, deferred to the discretion of the trial court.⁶⁷ *Norwood v. Kirkpatrick* illustrates this policy of deference, and, indeed, holds that district courts have *more* discretion to transfer cases under § 1404(a) than they have to dismiss them under the doctrine of *forum non conveniens*.⁶⁸ In *Norwood*, three railcar employees brought suit in the

⁶⁰ See 15 WRIGHT, MILLER & COOPER, *supra* note 20, § 3847.

⁶¹ *Id.* (observing that the multiplicity of factors considered by the federal courts on transfer motions is a result of the necessarily fact-intensive inquiry required to determine whether the litigation will proceed more conveniently for the parties and the witnesses and whether the litigation will be more just in another venue).

⁶² Steinberg, *supra* note 37, at 453.

⁶³ *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947); see Steinberg, *supra* note 37, at 453 (acknowledging that *Gulf Oil* has been the most important Supreme Court decision for § 1404(a)).

⁶⁴ *Gulf Oil*, 330 U.S. at 502.

⁶⁵ *Id.* at 508, 512.

⁶⁶ *Id.* at 508–09. (The private interests included: "relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive." The public interests mentioned by the court were: administrative concerns, the localized interest in the litigation, and docket crowding.)

⁶⁷ Steinberg, *supra* note 37, at 454.

⁶⁸ *Norwood v. Kirkpatrick*, 349 U.S. 29, 32 (1955) ("As a consequence, we believe that Congress, by the term 'for the convenience of parties and witnesses, in the interest of

Eastern District of Pennsylvania under the Federal Employers' Liability Act for injuries they received when a train derailed in South Carolina.⁶⁹ The defendant railroad filed a motion to transfer to the Eastern District of South Carolina, and that motion was granted.⁷⁰ In his transfer order the district judge stated that, if not for the Third Circuit's recent ruling in *All States Freight v. Modarelli* holding that broader discretion exists in the § 1404(a) context than in the forum non conveniens context, he would deny the motion to transfer.⁷¹ The Third Circuit denied the plaintiff's petition for mandamus, and the Supreme Court affirmed by adopting the Third Circuit's construction of § 1404(a) granting broader discretion to the trial judge on transfer decisions.⁷² Thus, under *Norwood*, the Court's usual course of action when reviewing a transfer order under § 1404(a) will be to defer to the discretion of the trial judge.

In *Hoffman v. Blaski*, the Court has placed some limits, however, on the discretion of district courts in ruling on transfer motions by constraining transfers to districts where the suit could have been brought at the outset of the litigation regardless of whether jurisdiction and venue were proper at the time of the transfer.⁷³ This limitation has not been well received; Professor Steinberg explains the source of *Hoffman*'s woes:

[T]he decision in *Hoffman* focuses on the wrong party. *Hoffman* protects the defendant against a transfer to an inconvenient forum. But the defendant does not need this protection where the defendant himself is seeking the transfer [I]f the defendant wishes to litigate in a forum where he lacks any contacts, and that forum is somehow more convenient than the court chosen by the plaintiff, it is hard to imagine how a transfer will prejudice the defendant.

Instead, the party who may suffer prejudice from a section 1404 transfer is the plaintiff—the party opposing the defendant's motion But the *Hoffman* rule provides no protection to a plaintiff opposing a

justice,' intended to permit courts to grant transfers upon a lesser showing of inconvenience. This is not to say that the relevant factors have changed or that the plaintiff's choice of forum is not to be considered, but only that the discretion to be exercised is broader.'").

⁶⁹ *Id.* at 29–30.

⁷⁰ *Id.* at 30.

⁷¹ *Id.*; see also *All States Freight v. Modarelli*, 196 F.2d 1010, 1011 (3d Cir. 1952).

⁷² *Norwood*, 349 U.S. at 32 ("[W]e believe that Congress . . . intended to permit courts to grant transfers upon a lesser showing of inconvenience. This is not to say that the relevant factors have changed . . . but only that the discretion to be exercised is broader.'").

⁷³ *Hoffman v. Blaski*, 363 U.S. 335, 344 (1960).

defendant's motion to transfer. A plaintiff's lack of contacts with a state in no way prevents a transfer to a court in that state.⁷⁴

The *Hoffman* rule, though a limitation of a district court's transfer discretion, has been the brunt of much scholarly criticism due to its failure to provide any protection to the plaintiff.⁷⁵

Section 1404(a), therefore, provides a protective mechanism whereby parties—usually defendants—may avoid undue inconvenience by seeking the transfer of their case to a more convenient forum. The district court is afforded substantial deference in the exercise of its discretion when ruling on transfer motions under § 1404(a), and whether the motion will be granted in any given case turns on case-specific facts.

B. *The All Writs Act, 28 U.S.C. § 1651*

Like § 1404(a), brevity defines the All Writs Act—the statute authorizing the writ of mandamus. The Act provides:

The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law. An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.⁷⁶

The Supreme Court has interpreted the All Writs Act in such a way as to create two distinct uses of the writ: supervisory and advisory.⁷⁷ The supervisory use of the writ refers to those circumstances where a court of appeals issues a writ to constrain a district court to its jurisdiction, that is, to correct an “usurpation of judicial power,” and to those situations when the writ issues to correct “a clear abuse of discretion.”⁷⁸ Supervisory mandamus is most often invoked to correct established and repeated bad habits of the

⁷⁴ Steinberg, *supra* note 37, at 461–62.

⁷⁵ See e.g., Herbert J. Korbel, *The Law of Federal Venue and Choice of the Most Convenient Forum*, 15 RUTGERS L. REV. 607, 613 (1961) (the Supreme Court relied on “rather bizarre reasoning” in *Hoffman*); Steinberg, *supra* note 37, at 457 (“[T]he Hoffman rule is an inappropriate limitation on the motion to transfer.”); 15 WRIGHT, MILLER & COOPER, *supra* note 20, § 3845 (“The commentators have been highly critical of *Hoffman v. Blaski* . . .”).

⁷⁶ All Writs Act, 28 U.S.C. § 1651(a)–(b) (2006). For the purposes of this Note, the focus will be on the first sentence of the statute.

⁷⁷ 16 WRIGHT, MILLER & COOPER, *supra* note 20, § 3934.

⁷⁸ See *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 383 (1953) (quoting *DeBeers Consol. Mines v. United States*, 325 U.S. 212, 217 (1945)); 16 WRIGHT, MILLER & COOPER, *supra* note 20, § 3934 (quoting *La Buy v. Howes Leather Co.*, 352 U.S. 249, 257 (1957)).

district courts.⁷⁹ The advisory use of mandamus, on the other hand, refers to the use of the writ to review novel and important questions not previously presented to any court that would escape review on final judgment.⁸⁰ The discussion relating to mandamus in the remainder of this Note regards only supervisory mandamus. Therefore, an extended consideration of advisory mandamus is beyond the scope of this Note, and any further mention of mandamus should be understood as referring to the supervisory use of the writ.⁸¹

La Buy v. Howes Leather Co. is the most important case within the realm of supervisory mandamus.⁸² *La Buy* involved mandamus proceedings to compel a United States district judge to vacate his orders under Fed. R. Civ. P. 53(b) referring the trial of antitrust cases to a special master.⁸³ The Seventh Circuit issued a writ of mandamus compelling the district judge to vacate his referrals because it found that the orders were beyond the scope of the district court's power under Rule 53(b).⁸⁴

On review, the Supreme Court addressed the circuit court's "naked power" to issue the writ, and noted that "the common-law writs, like equitable remedies, may be granted or withheld in the sound discretion of the court," and that the re-codification of the All Writs Act in 1948 had done nothing to diminish that power.⁸⁵ Regarding whether the writ of mandamus could be used in the method employed by the Seventh Circuit, to correct an often repeated error, the Court held that the "supervisory control of the District Courts by the Courts of Appeals is necessary to proper judicial administration in the federal system. The All Writs Act confers on the Courts of Appeals the discretionary power to issue writs of mandamus in the exceptional circumstances existing here."⁸⁶ The Courts of Appeals may, therefore, exercise their supervisory mandamus power and issue a writ of

⁷⁹ See 16 WRIGHT, MILLER & COOPER, *supra* note 20, § 3934.1.

⁸⁰ See *Schlagenhauf v. Holder*, 379 U.S. 104, 111 (1964); 16 WRIGHT, MILLER & COOPER, *supra* note 20, § 3934.1.

⁸¹ For additional discussion regarding the distinction between the supervisory and advisory uses of the writ of mandamus see 16 WRIGHT, MILLER & COOPER, *supra* note 20, § 3934.1 n.5 (listing cases).

⁸² *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957).

⁸³ *Id.* at 250.

⁸⁴ *Id.* at 256.

⁸⁵ *Id.* at 255 (quoting *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 25 (1943)).

⁸⁶ *Id.* at 259-60.

mandamus in order to correct a trial court when it clearly abuses its discretion or takes action it has no power to take.⁸⁷

The Supreme Court recently clarified the standard to be applied when determining whether a writ of mandamus will issue. In *Cheney v. United States District Court for D.C.*, the Court set out a three-pronged test for the issuance of the writ:

As the writ is one of the most potent weapons in the judicial arsenal, three conditions must be satisfied before it may issue. First, the party seeking issuance of the writ [must] have no other adequate means to attain the relief he desires,—a condition designed to ensure that the writ will not be used as a substitute for the regular appeals process. Second, the petitioner must satisfy the burden of showing that [his] right to issuance of the writ is clear and indisputable. Third, even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances.⁸⁸

The All Writs Act, then, provides courts of appeals with the power to issue writs of mandamus in supervision of the district courts. This is a power, however, that must be wielded with care, and the Supreme Court has articulated a three-prong test to determine when the writ should issue. Despite the Court's clear articulation regarding the availability of mandamus and the standard which is to govern the issuance of the writ of mandamus, the confluence of mandamus doctrine and § 1404(a) has produced nothing short of chaos in the appellate courts.

C. Supervising Discretion: Mandamus Review of § 1404(a) Transfer Orders

When a litigant desires review of a district court's disposition on a transfer motion, the doctrines of mandamus and transfer collide. An order granting or denying transfer under § 1404(a) is interlocutory in nature and, therefore, not immediately appealable under 28 U.S.C. § 1291.⁸⁹

⁸⁷ See *Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 380 (2004) (quoting *Will v. United States*, 389 U.S. 90, 95–96 (1967) and *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 383 (1953)).

⁸⁸ *Id.* at 380–81 (internal quotation marks omitted).

⁸⁹ See *In re Federal-Mogul Global, Inc.*, 300 F.3d 368, 378 (3d Cir. 2002); *D'Ippolito v. Am. Oil Co.*, 401 F.2d 764, 765 (2d Cir. 1968) (“There is simply no basis for thinking that, despite twenty years of judicial construction that orders under § 1404(a) can be reviewed only by mandamus . . . [O]ne type of order under § 1404(a) has been appealable all along.”); 15 WRIGHT, MILLER & COOPER, *supra* note 20, § 3855 (“It is entirely settled . . . that an order granting or denying a motion to transfer venue under Section 1404(a) of Title 28 of the United States Code is interlocutory in character and not

Additionally, the availability of interlocutory review of transfer orders under 28 U.S.C. § 1292(b) is disputed.⁹⁰ Mandamus, therefore, is the only consistently available, immediate, and effective option for review of transfer orders.⁹¹

Mandamus review of transfer orders takes two different forms: review for usurpation of judicial power—sometimes called review for “error of law”—and review for abuse of discretion.⁹² Using mandamus to review district court transfer orders for usurpation of judicial power or error of law is uncontroversial and available in every circuit.⁹³ Whether a court of appeals

immediately appealable under Section 1291 of the same Title.”). It should also be noted that § 1404(a) orders are generally not appealable under the collateral order doctrine. *See* *Nascone v. Spudnuts*, 735 F.2d 763, 772 (3d Cir. 1984) (“[O]rders granting or denying motions to transfer under 28 U.S.C. § 1404(a) . . . are not immediately appealable under 28 U.S.C. § 1291 as collaterally final orders.”).

⁹⁰ Compare *Garner v. Wolfinbarger*, 433 F.2d 117, 120 (5th Cir. 1970) (no review of transfer orders under § 1404(a) by way of § 1292(b)), and *A. Olinick & Sons v. Dempster Bros.*, 365 F.2d 439, 443 (2d Cir. 1966) (noting that “§ 1292(b) is not available as a means to review the grant or denial of § 1404(a) motions for incorrect evaluation of proper factors” because “the correctness of such an evaluation” cannot be “described as a controlling question of law.” (internal citations omitted)), and *Standard v. Stoll Packing Corp.*, 315 F.2d 626, 626 (3d Cir. 1963) (refusing to allow appeal of denial of transfer under § 1292(b)), and *Bufalino v. Kennedy*, 273 F.2d 71, 71 (6th Cir. 1959) (denying interlocutory review of a § 1404(a) order because such orders are not immediately appealable under § 1291 or § 1292(b) in the Sixth Circuit), with *Houston Fearless Corp. v. Teter*, 318 F.2d 822, 827–28 (10th Cir. 1963) (on a § 1292(b) appeal the court held that the district court had not erred by denying petitioner’s § 1404(a) transfer motion).

⁹¹ *See In re Nat’l Presto Indus.*, 347 F.3d 662, 663 (7th Cir. 2003) (recognizing that no adequate remedy exists for an improper ruling on a transfer motion by way of an appeal from final judgment because the appellant would not be able to overcome harmless error).

⁹² *See* 15 WRIGHT, MILLER & COOPER, *supra* note 20, § 3855. Compare *Commercial Lighting Prods., Inc. v. U.S. Dist. Ct.*, 537 F.2d 1078, 1079 (9th Cir. 1976) (writ issued because the transferee forum was not one where the suit could have been brought originally), with *In re Horseshoe Entm’t*, 337 F.3d 429, 435 (5th Cir. 2003) (writ issued because district court was found to have abused its discretion in denying transfer).

⁹³ *See* 15 WRIGHT, MILLER & COOPER, *supra* note 20, § 3855 (“Almost all courts agree that the writs can be used if the trial court made an error of law . . .”); *see, e.g., In re Volkswagen AG*, 371 F.3d 201, 206 (5th Cir. 2004) (court erred as a matter of law because it considered an inappropriate factor, the location of counsel, in its § 1404(a) analysis); *In re BellSouth Corp.*, 334 F.3d 941, 953 (11th Cir. 2003) (mandamus is available to remedy clear usurpation of power); *In re Federal-Mogul Global, Inc.*, 300 F.3d 368, 379 (3d Cir. 2002) (mandamus is an appropriate remedy when the district court took action it had no power to take); *Hicks v. Duckworth*, 856 F.2d 934, 935 (7th Cir. 1988) (court usurped judicial power when it transferred habeas corpus action to a district where it could not have been brought); *In re Perry*, 859 F.2d 1043, 1046 (1st Cir. 1988) (noting that mandamus may be appropriate when the lower court acts beyond its authority

may employ mandamus to review transfer orders for abuse of discretion, and if so, to what extent, is, however, the subject of great dispute.⁹⁴

Federal appellate courts regularly issue the writ of mandamus to correct a trial court's disposition on a § 1404(a) transfer motion when the trial court has taken an action that it had no power to take—such as transferring the action to a district where it could not have been brought in the first instance—and in order to remedy other errors of law.⁹⁵ The following examples illustrate the types of errors of law remedied by mandamus: transferring an action to a district where it could not have been brought at the

such that it usurps judicial power); *In re Dalton*, 733 F.2d 710, 715 (10th Cir. 1984) (mandamus appropriate when the lower court acted without jurisdiction or usurped power); *In re Scott*, 709 F.2d 717, 719 (D.C. Cir. 1983) (issuing mandamus when the court erred as a matter of law by considering an improper transfer factor); *Toro Co. v. Alsop*, 565 F.2d 998, 1000 (8th Cir. 1977) (mandamus available when the trial judge transfers case where it could not have been brought originally thereby usurping judicial power); *Skil Corp. v. Millers Falls Co.*, 541 F.2d 554, 557 (6th Cir. 1976) (mandamus is the proper remedy when transfer has been ordered in violation of legal limits of 1404(a)); *A.J. Indus. v. U.S. Dist. Ct. for C.D. Cal.*, 503 F.2d 384, 386 (9th Cir. 1974) (court permitted mandamus review where district court judge allegedly considered improper factors in the transfer analysis); *Am. Flyers Airline Corp. v. Farrell*, 385 F.2d 936, 937 (2d Cir. 1967) (commenting that mandamus is not available to correct mere error in the exercise of judicial power, but is available to correct a usurpation of judicial power); *Clayton v. Warlick*, 232 F.2d 699, 705–06 (4th Cir. 1956) (mandamus available only to remedy usurpation of judicial power or the district judge's legal error).

⁹⁴ See *Hustler Magazine v. U.S. Dist. Ct.*, 790 F.2d 69, 70 (10th Cir. 1986) (“Cognizant that a thorny thicket abounds in this area, we are reluctant to compound the tangle.” (footnotes omitted)); *Roofing & Sheet Metal Servs., Inc. v. La Quinta Motor Inns, Inc.*, 689 F.2d 982, 987 (11th Cir. 1982) (“There is substantial disagreement among the circuits, and some apparent confusion within the respective circuits, concerning the appropriate role of mandamus as a remedy for abuses of discretion by district courts in deciding motions under § 1404(a).” (citations omitted)); *Wilkins v. Erickson*, 484 F.2d 969, 971 (8th Cir. 1973) (“The extent to which the writ of mandamus can be used to review an order granting or refusing transfer under § 1404(a) varies widely among federal appellate courts.”); *Kasey v. Molybdenum Corp. of Am.*, 408 F.2d 16, 18 (9th Cir. 1969) (“Lacking an authoritative pronouncement by the Supreme Court on the correctness of the issuance of the writ to evaluate a trial court's discretion, the circuits are drastically divided on the question.” (footnotes omitted)). The confusion of the federal courts in this area is so great that it has been recognized in the state courts. See *Leung v. Nunes*, 729 A.2d 956, 963–64 (Md. 1999) (“The federal courts of appeals for decades have struggled with the question of whether they should entertain petitions for mandamus to review orders granting or denying transfers, particularly where the error is alleged to be an abuse of discretion in applying correct legal principles.”); *State ex rel. Allied Chem. Co. v. Aurelius*, 474 N.E.2d 618, 619 (Ohio Ct. App. 1984) (“Some federal courts have [] employed the extraordinary writs to review interlocutory orders involving venue. In Ohio, on the contrary, it is the strong policy of the law to deny extraordinary writs in such cases.”).

⁹⁵ See 15 WRIGHT, MILLER & COOPER, *supra* note 20, § 3855.

outset of the litigation,⁹⁶ misinterpreting the statutorily prescribed transfer factors,⁹⁷ failing to provide an opportunity to be heard on the transfer motion,⁹⁸ omitting consideration of the statutory criteria,⁹⁹ and refusing to exercise discretion on a transfer motion when such exercise is required.¹⁰⁰

Mandamus review to remedy legal error is common and uncontroversial.¹⁰¹ Conversely, little or no agreement exists regarding mandamus review of transfer orders for abuse of discretion; several appellate courts have noted that the decisions regarding the availability and extent of review in this context are "in hopeless conflict."¹⁰² Some circuits allow mandamus review of § 1404(a) orders for abuse of discretion;¹⁰³ others have essentially created a system whereby these orders are unreviewable if the order of the district judge demonstrates that she considered the statutorily prescribed factors.¹⁰⁴ Still, other circuits have "served notice" that they will not review transfer orders for abuse of discretion "except in really extraordinary situations," which, pragmatically speaking, has meant that the

⁹⁶ See *Hoffman v. Blaski*, 363 U.S. 335, 344 (1960) (transfer must be to a district where the suit could have been brought at the commencement of the suit independent of the wishes of the defendant).

⁹⁷ See *Volkswagen AG*, 371 F.3d at 204 (district court misconstrued the meaning of "parties and witnesses" when it interpreted the phrase to be limited to those parties and witnesses mentioned in the original complaint).

⁹⁸ See *Hustler Magazine, Inc.*, 790 F.2d at 71 ("We grant the petition here because the trial judge did not give the petitioners a fair opportunity to establish that the interests of justice and the convenience of the parties and the witnesses mandated a change of venue."); see also *Swindell-Dressler Corp. v. Dumbauld*, 308 F.2d 267, 273-74 (3d Cir. 1962) (district court denied movant under § 1404(a) procedural due process by denying a hearing or opportunity to be heard on the transfer issue).

⁹⁹ See *In re Scott*, 709 F.2d 717, 721 (D.C. Cir. 1983) (mandamus may issue to remedy the *sua sponte* transfer of a case not justified by any of the statutory considerations); *Wiren v. Laws*, 194 F.2d 873, 874-75 (D.C. Cir. 1951) (issuing mandamus where the district judge did not justify his decision according to the statutory criteria of § 1404(a)).

¹⁰⁰ See *Chi., Rock Island & Pac. R.R. Co. v. Igoe*, 212 F.2d 378, 382 (7th Cir. 1954).

¹⁰¹ See *supra* note 93 and accompanying text.

¹⁰² See *Great N. Ry. Co. v. Hyde*, 238 F.2d 852, 856 (8th Cir. 1956); *Clayton v. Warlick*, 232 F.2d 699, 703 (4th Cir. 1956); see also 15 WRIGHT, MILLER & COOPER, *supra* note 20, § 3855.

¹⁰³ See, e.g., *In re Warrick*, 70 F.3d 736, 739 (2d Cir. 1995) (reviewing transfer order for abuse of discretion).

¹⁰⁴ See, e.g., *Kasey v. Molybdenum Corp. of Am.*, 408 F.2d 16, 20 (9th Cir. 1969) ("We decline to issue the writ when it appears from a well-reasoned holding by the trial judge that he has considered the issues listed in 1404(a) and has made his decision accordingly.").

Circuit refuses to review such orders at all.¹⁰⁵ Within the circuits that allow mandamus review for abuse of discretion, some allow for expansive review—the appellate court reconsiders the district court’s reasoning on each of the transfer factors—while other circuits provide for a more limited form of review.¹⁰⁶ Compounding the already substantial confusion in this area, regardless of the extent of review conducted, the circuits differ in their formulations of the standard that must be met in order for the writ to issue.¹⁰⁷ A leading commentator notes, by way of introduction to the topic, that

¹⁰⁵ See *In re Josephson*, 218 F.2d 174, 183 (1st Cir. 1954) (disapproved of on other grounds by *In re Union Leader Corp.*, 292 F.2d 381, 381–82 (1st Cir. 1961)). Though the *Josephson* court noted that, when the question is whether the trial judge abused her discretion in ruling on a transfer motion, it would deny leave to file a petition for mandamus “except in really extraordinary situations,” the First Circuit has never found such a situation, and this pronouncement, as evidenced by the lack of opinions in the circuit dealing with the issue, has been a practical prohibition on mandamus review of transfer orders for abuse of discretion in the First Circuit. See *Matrix Grp. Ltd., v. Rawlings Sporting Goods Co.*, 378 F.3d 29, 32 n.2 (1st Cir. 2004) (citing *In re Josephson* as the current position of the First Circuit); 15 WRIGHT, MILLER & COOPER, *supra* note 20, at § 3855.

¹⁰⁶ Compare *Volkswagen II*, 545 F.3d 304, 312 (5th Cir. 2008) (en banc) (quoting *In re Horseshoe Entm’t*, 337 F.3d 429, 432 (5th Cir. 2003) (allowing expansive review of the trial court’s decision)), with *In re Ralston Purina Co.*, 726 F.2d 1002, 1005–06 (4th Cir. 1984) (undertaking a limited review of the facts considered by the trial court even after holding that “it is in cases of abuse of judicial power, not merely abuse of discretion, that mandamus lies”), and *In re Josephson*, 218 F.2d at 183 (“[I]n the future, except in really extraordinary situations . . . we shall stop such mandamus proceedings at the very threshold, by denying leave to file the petitions for a writ of mandamus.”).

¹⁰⁷ See, e.g., *Volkswagen II*, 545 F.3d at 309–10 (“mandamus will be granted upon a determination that there has been a clear abuse of discretion” which produces a “patently erroneous result.”); *In re Nat’l Presto Indus.*, 347 F.3d 662, 663 (7th Cir. 2003) (“[M]andamus . . . is granted only upon a demonstration that the district court so far exceeded the proper bounds of judicial discretion as to be legitimately considered usurpative in character or in violation of a clear and indisputable legal right, or at the very least, patently erroneous and that the injury caused by the challenged order cannot be repaired by any means other than mandamus . . .” (citations omitted) (internal quotation marks omitted)); *In re Ralston Purina Co.*, 726 F.2d at 1005 (mandamus will issue only where abuse of judicial power has occurred); *Kasey*, 408 F.2d at 20 (“We decline to issue the writ when it appears from a well-reasoned holding by the trial judge that he has considered the issues listed in 1404(a) and has made his decision accordingly. It is not our function to substitute our judgment for that of the judge most familiar with the problem.”); *A. Olinick & Sons v. Dempster Bros.*, 365 F.2d 439, 445 (2d Cir. 1966) (mandamus will issue only to remedy clear-cut abuse of discretion); *McGraw-Edison Co. v. Van Pelt*, 350 F.2d 361, 363 (8th Cir. 1965) (Mandamus will not issue “[u]nless it is made clearly to appear that the facts and circumstances are without any basis for a judgment of discretion If the facts and circumstances are rationally capable of providing reasons for what the district court has done, its judgment based on those reasons will not be reviewed.”).

“variations among the courts of appeal, and the changes of view within a particular appellate court, are so great that the law on this point must be examined on a circuit-by-circuit basis.”¹⁰⁸

The confusion on all fronts of this issue reduces to three basic questions, the answers to which provide a valuable starting point for determining what the law should be with regard to mandamus review of transfer orders for abuse of discretion. The relevant questions are the following: (1) When is mandamus appropriate to review the district court’s exercise of discretion on a transfer motion? (2) Assuming that mandamus review of a trial court’s discretion is appropriate in some circumstances, what should the scope of the review be?¹⁰⁹ (3) Assuming that mandamus review is appropriate in some circumstances, within the prescribed scope of review, what standard must be met in order for the writ to issue?¹¹⁰ Because the threshold issue is the question of whether mandamus review of transfer orders for abuse of discretion should be available at all, the remainder of this Note focuses on answering that question and leaves the task of defining the appropriate scope and standard of review to another.

III. AN INTEREST-BASED ANSWER TO THE QUESTION: “WHEN IS MANDAMUS REVIEW OF A DISTRICT COURT’S EXERCISE OF DISCRETION ON A TRANSFER MOTION APPROPRIATE?”

The law regarding the availability of mandamus to review a trial court’s exercise of discretion on a motion to transfer venue under 28 U.S.C. § 1404(a) is in a state of discord.¹¹¹ And, the Ninth Circuit correctly observed that the dearth of guidance from the Supreme Court on this issue has created drastic division within the circuit courts.¹¹² The variety of views held by those courts has led to diverging decisions; some circuits have made mandamus review of transfer orders readily available, while others have effectively shut the doors of the courthouse.¹¹³ Still other circuits find themselves somewhere between the extremes.¹¹⁴

¹⁰⁸ 15 WRIGHT, MILLER & COOPER, *supra* note 20, § 3855.

¹⁰⁹ See cases cited *supra* note 106.

¹¹⁰ See cases cited *supra* note 107.

¹¹¹ See *supra* notes 102–05 and accompanying text.

¹¹² See *Kasey*, 408 F.2d at 18.

¹¹³ Compare *Volkswagen II*, 545 F.3d 304, 309 (5th Cir. 2008) (en banc) (recognizing the availability of mandamus in the Fifth Circuit “as a limited means” to review the discretion of a trial court exercised on a transfer order), and *In re Nat’l Presto Indus.*, 347 F.3d 662, 663 (7th Cir. 2003) (stating that the Seventh Circuit will review transfer motions for abuse of discretion and patent error), and *In re Tripathi* 836 F.2d 1406, 1407 (D.C. Cir. 1988) (mandamus review of transfer orders available to review for

Though “there is no agreement on the use of the writs to review the trial court’s exercise of its discretion,”¹¹⁵ it may not be fair, or accurate, to characterize the decisions of the courts as “a thorny thicket in hopeless conflict” as some courts have done.¹¹⁶ There are, in the decisions in which a writ of mandamus has issued to remedy a trial court’s abuse of discretion, several repeatedly protected interests. The circuit courts’ protection of these interests brings to this unsettled area of the law predictability, coherence, and organization. These factors are present in the decisions of every circuit in which a writ has issued in response to an abuse of discretion, and they persist through time and despite the various standards applied by the courts.¹¹⁷

gross abuse of discretion), and *In re Dalton*, 733 F.2d 710, 717 (10th Cir. 1984) (the Tenth Circuit will employ mandamus to review transfer orders for clear abuse of discretion), and *A. Olinick & Sons v. Dempster Bros.*, 365 F.2d 439, 445 (2d Cir. 1966) (mandamus review of transfer orders for “clearcut abuse of discretion” available in the Second Circuit), and *Lemon v. Druffel*, 253 F.2d 680, 685 (6th Cir. 1958) (reviewing a transfer order for clear abuse of discretion), with *Kasey*, 408 F.2d at 20 (stating that the Ninth Circuit will not engage in mandamus review of transfer orders for abuse of discretion where the judge has considered the transfer factors and decided accordingly), and *In re Josephson*, 218 F.2d 174, 182–83 (1st Cir. 1954) (no mandamus review of transfer orders in the First Circuit when all that is claimed is that the district judge abused his discretion when making the order), and *All States Freight, Inc. v. Modarelli*, 196 F.2d 1010, 1012 (3d Cir. 1952) (denying mandamus review of transfer orders in the Third Circuit for abuse of discretion when the trial judge has considered the transfer factors and made a decision).

¹¹⁴ See *In re Ralston Purina Co.*, 726 F.2d 1002, 1005 (4th Cir. 1984) (engaging in independent weighing of the transfer factors after purporting to only review for usurpation of judicial power in the Fourth Circuit); *Roofing & Sheet Metal Servs., Inc. v. La Quinta Motor Inns, Inc.*, 689 F.2d 982, 987 (11th Cir. 1982) (recognizing that under the correct circumstances the writ “might issue to correct an abuse of discretion” on a transfer order); *Toro Co. v. Alsop*, 565 F.2d 998, 1000 (8th Cir. 1977) (Eighth Circuit undertakes threshold examination for judicial arbitrariness and continues on to review of the facts and circumstances if the threshold factor is met).

¹¹⁵ 15 WRIGHT, MILLER & COOPER, *supra* note 20, § 3855.

¹¹⁶ *Id.* § 3855 n.29.

¹¹⁷ The factors are present in the Fifth Circuit’s decisions. See, e.g., *In re Horseshoe Entm’t*, 337 F.3d 429, 434 (5th Cir. 2003). That Court reviews transfer orders for “clear abuse of discretion leading to a patently erroneous result.” *Volkswagen II*, 545 F.3d at 310. The unifying factors are equally discernable in opinions of the Fourth Circuit, the Seventh Circuit, the Ninth Circuit, and the Eleventh Circuit. See *In re Ricoh Corp.*, 870 F.2d 570, 573 (11th Cir. 1989) (applying a clear abuse of discretion standard); *Pac. Car & Foundry Co. v. Pence*, 403 F.2d 949, 951–52 (9th Cir. 1968) (applying a “clearly erroneous” standard); *Akers v. Norfolk & W. Ry. Co.*, 378 F.2d 78, 80 (4th Cir. 1967) (applying an abuse of discretion standard); *Chi., Rock Island & Pac. R.R. Co. v. Igoo*, 220 F.2d 299, 304 (7th Cir. 1955) (applying abuse of discretion standard). The standards applied by the courts in the preceding cases may or may not be the current standard within the circuit. However, for the purposes of this Note, the currency of the standard

Specifically, in each case in which the writ of mandamus has issued in order to redress a trial court's abuse of discretion in ruling on a transfer motion, one or more of the following circumstances is present: (1) the trial court's decision has significantly impaired the ability of one or more parties to conveniently access evidence; (2) the trial court's decision has significantly inconvenienced the witnesses; (3) the trial court's decision has located the litigation in a venue with no meaningful contacts to the case; (4) the trial court's decision has negatively affected judicial economy; or (5) the trial court's decision has ignored an otherwise valid and enforceable contract.¹¹⁸ The interests commonly called upon by circuit courts to justify the issuance of the writ of mandamus to remedy a trial court's abuse of discretion on a transfer ruling, therefore, provide the answer to the question: "When should mandamus review be available?" Mandamus review should be triggered when the ruling of a district court on a transfer motion adversely affects one or more of the interests historically protected by the circuit courts on mandamus review or an interest of similar importance.

A. Interests Historically Protected by Mandamus

1. Access to Evidence

Circuit courts regularly appeal to the interest of the parties in convenient access to evidence in order to justify the issuance of a writ.¹¹⁹ The appellate courts have shown concern that the parties have the ability to conveniently access not only different types of evidence, but also certain forms of evidence.¹²⁰ Thus, where a trial court's decision to grant or deny transfer of

applied is less important than the court's reasoning resulting in the issuance of the writ. Thus, decisions under old rules will be analyzed in order to determine the interests triggering the issuance of the writ.

¹¹⁸ Though the factors considered by courts when determining whether transfer under § 1404(a) is appropriate vary slightly across the circuits, these five interests represent a discrete subset of those factors. See 15 WRIGHT, MILLER & COOPER, *supra* note 20, § 3847 ("Federal courts differ in their statements as to what constitute the relevant factors for transfer of venue. Some courts have said that a district judge's ruling on a § 1404(a) transfer motion should consider the same factors as would a court ruling on a motion to dismiss for forum non conveniens. However, most federal courts are willing to consider a wider variety of factors, which seems appropriate given the significant differences between the common law and statutory procedures.").

¹¹⁹ See, e.g., *In re TS Tech USA Corp.*, 551 F.3d 1315, 1321 (Fed. Cir. 2009) ("Because all of the physical evidence, including the headrests and the documentary evidence, are far more conveniently located near the Ohio venue, the district court erred in not weighing this factor in favor of transfer.").

¹²⁰ See *In re Hoffmann-La Roche Inc.*, 587 F.3d 1333, 1336 (Fed Cir. 2009) (noting that there were at least four non-party witnesses located within 100 miles of the Eastern

venue results in the imposition of a “significant and unnecessary burden” on the parties’ ability to access sources of proof that would be avoided had the judge come out differently on the transfer analysis, circuit courts may protect the parties’ interests on mandamus review.¹²¹

In *Akers*, for example, the plaintiff filed a Federal Employers Liability action against Norfolk & Western Railway in the district court located within the Western District of Virginia at Roanoke, the city where the defendant’s headquarters were located.¹²² The railroad employee, however, suffered his injury in Cyrus, West Virginia, and the defendant subsequently moved to transfer venue to the Southern District of West Virginia.¹²³ The trial court denied defendant’s motion to transfer.¹²⁴

In issuing a writ of mandamus compelling the district judge to transfer the action to the Southern District of West Virginia, the Fourth Circuit cited convenient access to evidence as the primary reason for its holding.¹²⁵ None of the witnesses to the accident were within Western District of Virginia’s subpoena power, a fact which would place the defendant in a situation in which it was “left with no alternative but to adduce its evidence through depositions, a mode of proof universally acknowledged to be inferior to the personal appearance of witnesses in court.”¹²⁶ Moreover, the location of the accident was in the Southern District of West Virginia, where the plaintiff resided and the medical records detailing plaintiff’s post-accident treatments were located.¹²⁷

District of North Carolina who were therefore subject to the Eastern District’s compulsory subpoena power for both deposition and trial testimony whereas there were no non-party witnesses subject to the Eastern District of Texas’s compulsory subpoena power for both deposition and trial); *Pac. Car & Foundry Co.*, 403 F.2d at 953 (recognizing that the district judge’s failure to transfer an action from Hawaii to Washington resulted in the hindering of defendant’s ability to conveniently access important documentary evidence); *Igoe*, 220 F.2d at 302 (noting that petitioner testified by affidavit that “it would be impossible for it to properly present its defense by depositions as it could not, in advance, anticipate evidence which may be offered by the plaintiff”); *accord Akers*, 378 F.2d at 79 (not appropriate to put defendant in position of having to present its entire case through deposition when it is possible to locate the trial in a forum where live testimony may be compelled).

¹²¹ See *In re Genentech*, 566 F.3d 1338, 1346 (Fed. Cir. 2009) (citing the significant and unnecessary burden that would adhere in the form of document transport if the case were to remain in the Eastern District of Texas instead of being transferred to the Northern District of California).

¹²² *Akers*, 378 F.2d at 79.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

The failure of the district court to transfer the case from the Western District of Virginia to the Southern District of West Virginia on these facts created a situation in which the only benefit to either party was the prospect of shorter time to trial.¹²⁸ The downside, however, was that neither party had the ability to put on their best case. The issuance of the writ cured this undesirable situation by placing the litigation in a venue where the sources of proof were easily accessible to both parties and where a trial would take place in less than a year.¹²⁹

Also instructive is the most recent ruling in this line of mandamus cases, *In re Nintendo Co.*¹³⁰ In *Nintendo*, Motiva filed a patent infringement suit against Nintendo in the Eastern District of Texas alleging that the Wii infringed Motiva's patent relating to a system that measures human movements.¹³¹ Nintendo moved to transfer venue under § 1404(a) to the Western District of Washington—the company's American headquarters are located in Redmond, Washington and Nintendo is organized under the laws of Washington.¹³² The Eastern District of Texas denied Nintendo's motion to transfer.¹³³

On Nintendo's petition for a writ of mandamus, the Federal Circuit noted access to documentary evidence, an exceedingly important type of evidence in a patent infringement action, as one of the motivating factors in its decision to issue the writ.¹³⁴ Neither Nintendo nor Motiva housed documents

¹²⁸ *Akers*, 378 F.2d at 79. Arguably, one additional benefit that would have accrued to the plaintiff was that the litigation would take place in the forum of his choice. The Court noted the right of the plaintiff to select his forum, that this selection was not to be easily displaced, and that the initial decision regarding whether it would be rested in the discretion of the district judge. *Id.* at 80. The Court, however, considered that if it was to be "equally sensible to an abuse of [the district judge's] discretion when measured upon the considerations of 28 U.S.C. § 1404(a)," this was an instance where the plaintiff's choice had to give way. *Id.*

¹²⁹ *Id.* at 79.

¹³⁰ *In re Nintendo Co.*, 589 F.3d 1194 (Fed. Cir. 2009).

¹³¹ *Id.* at 1196.

¹³² *Id.* at 1197.

¹³³ *Id.*

¹³⁴ *Id.* at 1199. When an issue in a patent case is appealed to the Federal Circuit and that issue does not involve substantive issues of patent law, the Federal Circuit applies the law of the regional circuit in which the district court sits, and in the case of *Nintendo*, the Fifth Circuit. *See Storage Tech. Corp. v. Cisco Sys., Inc.*, 329 F.3d 823, 836 (Fed. Cir. 2003). In patent infringement actions, the majority of the evidence is in document form. Thus, the physical location of the majority of the documents is of paramount importance when a district court passes on a motion to transfer venue. In most cases, transferring venue to the district where the defendant's documents are located will facilitate the expeditious resolution of the litigation: "In patent infringement cases, the bulk of the relevant evidence usually comes from the accused infringer. Consequently,

in the Eastern District of Texas, and all of Nintendo's documents were housed in either the Western District of Washington or in Kyoto, Japan.¹³⁵ Though Nintendo would be required to transport documents from Japan in any event, access to sources of proof was more readily available to both parties in the Western District of Washington than in the Eastern District of Texas.¹³⁶ Thus, because "most evidence resides in Washington or Japan with *none* in Texas," the Federal Circuit justified its issuance of the writ to compel transfer to the Western District of Washington, in part, on access to evidence grounds.¹³⁷

The trend illustrated by *Akers* and *Nintendo*—that circuit courts which review transfer orders for abuse of discretion on mandamus review are more apt to issue the writ when the decision of the district judge to grant or deny transfer impairs the ability of one or more parties to conveniently access sources of proof—exists in nearly every case where mandamus has issued to remedy a transfer order abuse of discretion.¹³⁸ Ready access to evidence, then, is an interest that the circuit courts seem willing to protect by exercise of their mandamus power.

the place where the defendant's documents are kept weighs in favor of transfer to that location." *Neil Bros. v. World Wide Lines, Inc.*, 425 F. Supp. 2d 325, 330 (E.D.N.Y. 2006).

¹³⁵ *In re Nintendo*, 589 F.3d at 1199.

¹³⁶ *Id.* The court addressed a common objection to consideration of convenient access to documentary evidence in the transfer analysis: the impact of technology. *Id.* Quoting *Volkswagen II*, the court stated that, "[t]he fact 'that access to some sources of proof presents a lesser inconvenience now than it might have absent recent developments does not render this factor superfluous.'" *Id.* (quoting *Volkswagen II*, 545 F.3d at 316).

¹³⁷ *In re Nintendo*, 589 F.3d at 1199–1200 (emphasis added).

¹³⁸ See, e.g., *In re Genentech*, 566 F.3d 1338, 1345–46 (Fed. Cir. 2009); *In re Hoffmann-La Roche*, 587 F.3d 1333, 1336–38 (Fed. Cir. 2009); *In re TS Tech USA Corp.*, 551 F.3d 1315, 1320–21 (Fed. Cir. 2009); *Volkswagen II*, 545 F.3d at 316–17; *In re Horseshoe Entm't*, 337 F.3d 429, 434 (5th Cir. 2003); *United States v. Lord*, 542 F.2d 719, 724 (8th Cir. 1976) (*Lord* is technically not a mandamus case, but a prohibition case. However, when a writ of prohibition issues to prevent a judge from taking some action, the circumstances are such that if the judge had taken the action prohibited, mandamus would be appropriate; the court held in *Lord* that had the judge taken the prohibited action and transferred the case, it would have amounted to a "clear abuse of discretion," the standard that must be met in order for mandamus to issue. *Id.* at 724. Thus, prohibition cases are essentially preemptory mandamus cases.); *Pac. Car & Foundry Co. v. Pence*, 403 F.2d 949, 953 (9th Cir. 1968); *Chi. Rock Island and Pac. R.R. Co. v. Igoe*, 220 F.2d 299, 301 (7th Cir. 1955).

2. Inconvenience of Witnesses

Circuit courts undertaking mandamus review of transfer rulings have not kindly viewed district court decisions imposing significant inconveniences on witnesses.¹³⁹ The courts express concern over requiring witnesses to travel great distances to attend trial when a more convenient venue is available and the central relation of the action to the distant venue is that the plaintiff selected it.¹⁴⁰ This concern stems from the general acceptance that testifying in a distant venue disrupts the normal life of the non-party witness; a concern expressly included in the language of the transfer statute.¹⁴¹ Thus, the interests of witnesses in testifying in a convenient venue have been protected by the appellate courts on mandamus review when the ruling of the district judge results in excessive inconvenience.

Chicago Rock Island and Pacific Railroad Co. v. Igoe exemplifies the interests of witnesses protected by the issuance of the writ. In *Igoe*, Charles Mikesell was involved in a fatal car-train accident in Avoca, Iowa.¹⁴² His wife, Claudine, the administratrix of his estate, brought a wrongful death action against the railroad in Illinois state court.¹⁴³ The railroad removed the action to the United States District Court for the Northern District of Illinois, and subsequently filed a motion to transfer venue under § 1404(a) to the Southern District of Iowa.¹⁴⁴ The district court denied the railroad's § 1404(a) motion, but the Seventh Circuit granted its petition for mandamus, thus compelling the district court to effect the transfer to the Southern District of Iowa.¹⁴⁵

Concern for the convenience of the witnesses figured prominently in the Seventh Circuit's decision to grant mandamus relief.¹⁴⁶ The accident took

¹³⁹ See, e.g., *Igoe*, 220 F.2d at 303 (“[I]t is self-evident that the convenience of both plaintiff's and defendant's witnesses would be served by a trial of the cause in the Southern District of Iowa There is nothing in this record to indicate the convenience of witnesses will be served by a trial in Chicago. There is no factual basis . . . for the respondent's conclusion to the contrary.”).

¹⁴⁰ *Id.* at 303–04.

¹⁴¹ 28 U.S.C. § 1404(a) (2006) (“For the convenience of parties and witnesses” (emphasis added)); see also *In re Volkswagen AG*, 371 F.3d 201, 205 (5th Cir. 2004) (“Additional distance means additional travel time; additional travel time increases the probability for meal and lodging expenses; and additional travel time with overnight stays increases the time which these fact witnesses must be away from their regular employment.”).

¹⁴² *Igoe*, 220 F.2d at 301.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 301, 305.

¹⁴⁶ *Id.* at 303.

place in the Southern District of Iowa, all of the witnesses—for both the plaintiff and defendant—were residents of Iowa.¹⁴⁷ Holding the trial in Chicago would have burdened all of the witnesses with a trip of over 400 miles by train that would have consumed more than six hours each way.¹⁴⁸ If, in the alternative, the Northern District of Illinois transferred the action to an Iowa district court, as requested by the railroad, the maximum distance to be traveled by any witness would be 104 miles.¹⁴⁹ The Seventh Circuit noted that it was “self-evident” that all of the non-party witnesses would be inconvenienced by an Iowa trial, and issued the writ of mandamus in order to, among other things, protect those witnesses.¹⁵⁰

In re Genentech is also relevant in regard to the protection of witnesses. There, the Federal Circuit opined that “[t]he convenience of the witnesses is probably the single most important factor in transfer analysis.”¹⁵¹ Thus, the court dismissed the Eastern District of Texas’s explanation that, although Genentech had identified numerous witnesses in the proposed new venue, and there were none in the Eastern District of Texas where the case presently was, the convenience of the witnesses did not weigh in favor of transfer because Genentech had failed to identify “key witnesses” in the proposed new venue.¹⁵² “It was not necessary for the district court to evaluate the significance of the identified witnesses’ testimony”; the convenience of all witnesses is to be considered in the transfer analysis, and the witnesses’ interests in the important factor of convenience, therefore, may be protected by mandamus review.¹⁵³

¹⁴⁷ *Id.* at 301, 303.

¹⁴⁸ *Igoe*, 220 F.2d at 302–03.

¹⁴⁹ *Id.* at 303.

¹⁵⁰ *Id.*

¹⁵¹ *In re Genentech*, 566 F.3d 1338, 1343 (Fed. Cir. 2009) (quoting *Neil Bros. v. World Wide Lines, Inc.*, 425 F.2d 325, 329 (E.D.N.Y. 2006)).

¹⁵² *Id.* at 1343–44.

¹⁵³ *Id.* at 1344; see also *In re Nintendo Co.*, 589 F.3d 1194, 1198–99 (Fed. Cir. 2009) (noting as part of its justification for issuing the writ that the cost of attendance for willing witnesses “clearly favors transfer”); *In re TS Tech USA Corp.*, 551 F.3d 1315, 1320 (Fed. Cir. 2009) (“All of the identified key witnesses in this case are in Ohio, Michigan, and Canada. Thus, the witnesses would need to travel approximately 900 more miles to attend trial in Texas than in Ohio.”); *Volkswagen II*, 545 F.3d 304, 317 (5th Cir. 2008) (en banc) (justifying the issuance of mandamus, in part, by demonstrating the inconvenience imposed on witnesses by the district judge’s denial of transfer); *Pac. Car & Foundry Co. v. Pence*, 403 F.2d 949, 953 (9th Cir. 1968) (“Many witnesses, including several members of petitioner’s corporate staff, would have to travel from the mainland to Hawaii in order to give testimony with consequent disruption of the conduct of petitioner’s operation.”).

Igoe and *Genentech* show that § 1404(a)'s language addressing the convenience of the witnesses is not ornamental. If a district court makes a transfer decision resulting in the witnesses suffering additional inconvenience due to the new location of the litigation, appellate courts will approach that decision with skepticism, and may issue a writ of mandamus to remedy the harm to the witnesses' convenience.¹⁵⁴

3. *Localized Interest*

When the location of litigation has little connection to the facts underlying the dispute absent the fact that the plaintiff chose it, circuit courts have granted the plaintiff's choice minimal weight on mandamus review, and have cited this factor as one justification for the issuance of a writ directing transfer to a venue with more meaningful contacts.¹⁵⁵ Appellate courts have recognized that citizens of a community with no connection to the litigation ought not be burdened with jury duty and that the people of the venue should have more than a curious interest in the litigation.¹⁵⁶ The absence of some meaningful connection between the venue and the litigation, therefore, seems

¹⁵⁴ See also *In re Horseshoe Entm't*, 337 F.3d 429, 433 (5th Cir. 2003) (issuing the writ, in part, because the witnesses were inconvenienced by the denial of transfer); *Akers v. Norfolk & W. Ry.*, 378 F.2d 78, 79 (4th Cir. 1967) (partially justifying the issuance of the writ on grounds that the witnesses were inconvenienced by denial of transfer).

¹⁵⁵ See, e.g., *Pac. Car & Foundry*, 403 F.2d at 954 ("Congress was not willing to give plaintiff free rein to haul defendant hither and yon at their caprice" . . . Plaintiff's choice of forum, then, is not the final word . . . If the operative facts have not occurred within the forum of original selection and that forum has no particular interest in the parties or the subject matter, the plaintiff's choice is entitled only to minimal consideration." (footnotes omitted) (quoting *United States v. Nat'l City Lines*, 334 U.S. 573, 587 (1948))).

¹⁵⁶ See *In re Volkswagen of Am., Inc.*, 506 F.3d 376, 387 n.6 (5th Cir. 2007), *aff'd en banc*, 545 F.3d 304 (5th Cir. 2008) (quoting *Koehring Co. v. Hyde Constr. Co.*, 324 F.2d 295, 296 (5th Cir. 1963)). The quote from *Koehring* originated in *Gulf Oil Corp. v. Gilbert*, and more than is given in *Koehring* is relevant here:

Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home.

Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508–09 (1947); see also *Volkswagen II*, 545 F.3d at 318 ("That the residents of the Marshall Division [of the Eastern District of Texas] 'would be interested to know' whether a defective product is available does not imply that they have an interest—that is, a stake—in the resolution of this controversy.").

to incline circuit courts to flex their “mandamus muscle” and send the litigation to a more appropriate venue.¹⁵⁷

The Fifth Circuit’s *Volkswagen II* decision demonstrates the willingness of the appellate courts to consider the localized interest in the litigation when reviewing a grant or denial of transfer under § 1404(a).¹⁵⁸ The controversy in *Volkswagen II* originated from a deadly automobile accident on the highways of Dallas, Texas.¹⁵⁹ One of the accident victims was driving a Volkswagen Golf and subsequently brought a products liability action against Volkswagen alleging that design defects in the Golf caused the plaintiff harm.¹⁶⁰ The plaintiff brought the products liability suit, however, not in Dallas, which is in the Northern District of Texas, but in the Eastern District of Texas at Marshall.¹⁶¹ The plaintiffs selected the Eastern District of Texas despite the following uncontroverted facts:

[T]he Volkswagen Golf was purchased in Dallas County, Texas; the accident occurred on a freeway in Dallas, Texas; Dallas residents witnessed the accident; Dallas police and paramedics responded and took action; a Dallas doctor performed the autopsy; the third-party defendant lives in Dallas County, Texas; none of the plaintiffs live in the Marshall Division; no known party or non-party witness lives in the Marshall Division; no known source of proof is located in the Marshall Division; and none of the facts giving rise to this suit occurred in the Marshall Division.¹⁶²

The Eastern District of Texas simply had no contacts with the lawsuit.

The en banc Fifth Circuit, in explaining its decision to issue a writ of mandamus compelling the transfer of the case from the Eastern District of Texas to the Northern District of Texas, Dallas Division, emphasized the fact that “there is no relevant factual connection to the Marshall Division.”¹⁶³ The Court’s analysis of the localized interests factor balks at the prospect of allowing litigation to remain in a venue with no connection to the facts underlying the dispute, and makes clear that before the plaintiff’s choice of forum will be accorded significance, some evidence of meaningful contacts

¹⁵⁷ The term “mandamus muscle” was coined by Judge Finnegan in his *Igoe* dissent: “Our mandamus power is not a muscle which requires exercise to maintain its vitality.” *Chi. Rock Island and Pac. R.R. Co. v. Igoe*, 220 F.2d 299, 307 (7th Cir. 1955) (Finnegan, J., dissenting).

¹⁵⁸ See *Volkswagen II*, 545 F.3d at 318.

¹⁵⁹ *Id.* at 307.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.* at 307–08.

¹⁶³ *Id.* at 318.

with the forum is required.¹⁶⁴ If no such evidence is put forth in response to a transfer motion, and the motion is denied, mandamus may quickly follow.

In re Hoffman-La Roche is analogous. In a patent infringement suit brought in the Eastern District of Texas, the Federal Circuit issued mandamus to compel transfer to the Eastern District of North Carolina in part because, “there appears to be no connection between this case and the Eastern District of Texas except that in anticipation of this litigation, Novartis’ counsel in California . . . transferred [documents] to the offices of its litigation counsel in Texas,” but “the Eastern District of North Carolina’s local interest in this case remains strong because the cause of action calls into question the work and reputation of several individuals residing in or near that district and who presumably conduct business in that community.”¹⁶⁵

The basic principle apparent in *Volkswagen II* and *Hoffmann-La Roche* is that though the plaintiff’s choice of forum should not be easily disturbed,¹⁶⁶ the forum selected by the plaintiff must have some meaningful connection to the litigation.¹⁶⁷ If it does not, and the district judge fails, on a motion to transfer and in the absence of other mitigating factors, to transfer the litigation to a more appropriate venue, a writ is particularly appropriate to prevent an undue burden from being imposed on the citizens of a forum wholly foreign to the controversy. Where these circumstances are present, the appellate court is more likely to issue the writ of mandamus to remedy the trial court’s abuse of discretion.¹⁶⁸

¹⁶⁴ *Volkswagen II*, 545 F.3d at 318 (“In contrast [to the residents of the Marshall Division], the residents of the Dallas Division have extensive connections with the events that gave rise to this suit.” Thus, “the only connection between this case and the Eastern District of Texas is plaintiffs’ choice to file there.”).

¹⁶⁵ *In re Hoffmann-La Roche*, 587 F.3d 1333, 1336–37 (Fed. Cir. 2009).

¹⁶⁶ See *Shutte v. Armco Steel Corp.*, 431 F.2d 22, 25 (3d Cir. 1970) (“It is black letter law that a plaintiff’s choice of proper forum is a paramount consideration in any determination of a transfer request, and that choice should not be lightly disturbed.”).

¹⁶⁷ See *Pac. Car & Foundry Co. v. Pence*, 403 F.2d 949, 954 (9th Cir. 1968) (plaintiff’s choice of forum given “minimal consideration” if it has no connection to the facts of the dispute or interest in the case).

¹⁶⁸ See *In re Nintendo Co.*, 589 F.3d 1194, 1200 (Fed. Cir. 2009) (“The district court gave the plaintiff’s choice of forum far too much deference” and therefore “clearly abused its discretion in denying transfer from a venue with no meaningful ties to the case.”); *In re TS Tech USA Corp.*, 551 F.3d 1315, 1321 (Fed. Cir. 2009) (no connection to the Eastern District of Texas in a patent case other than the fact that some of the allegedly infringing products had been sold in the district); *Chi. Rock Island and Pac. R.R. Co. v. Igou*, 220 F.2d 299, 304 (7th Cir. 1955) (quoting *Josephson v. McGuire*, 121 F. Supp. 83, 84 (D. Mass. 1954)) (“A large measure of deference is due to the plaintiff’s freedom to select his own forum. Yet this factor has minimal value where none of the conduct complained of occurred in the forum selected by the plaintiff.” (internal quotation marks omitted)).

4. Judicial Economy

Judicial economy and the preservation and allocation of scarce judicial resources are significant policy concerns of the federal courts.¹⁶⁹ Burgeoning dockets force courts to use every tool at their disposal to ensure that their time and energies are expended on the matters most deserving of them.¹⁷⁰ In the transfer context, the writ of mandamus has been such a tool; writs have been issued to correct abuses of discretion by trial courts in order to avoid gross waste of judicial resources.¹⁷¹ When the writ issues to prevent waste of resources, the circumstances are usually such that if mandamus did not issue to either compel transfer or to vacate an already issued order, the result would be multiple trials in different forums on the same, or substantially the same, facts.¹⁷²

Docket congestion and the speed of transferee courts are secondary judicial economy concerns noted by the appellate courts.¹⁷³ The speed at which litigation progresses in the transferee court, when employed as a justification for issuing a writ of mandamus to compel or vacate a transfer order, however, due to the speculative nature of the factor, is always coupled with at least one other justification.¹⁷⁴ It, unlike, the judicial economy

¹⁶⁹ See *Auto-Owners Ins. Co. v. Ace Elec. Serv.*, 648 F. Supp. 2d 1371, 1377 n.2 (M.D. Fla. 2009) (recognizing the preservation of judicial resources as an important policy interest); see also *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 411 (1971) (Harlan, J., concurring) (“Judicial resources, I am well aware, are increasingly scarce these days.”).

¹⁷⁰ See *Kerr v. U.S. Dist. Ct. for N.D. Cal.*, 426 U.S. 394, 403 (1976) (recognizing the reality of “excessively crowded lower court dockets”). Summary judgment, for example, is one tool used by the district courts to alleviate docket pressure. See Craig M. Reiser, Comment, *The Unconstitutional Application of Summary Judgment in Factually Intensive Inquiries*, 12 U. PA. J. CONST. L. 195, 220–21 (2009).

¹⁷¹ See, e.g., *Gen. Tire & Rubber Co. v. Watkins*, 373 F.2d 361, 362 (4th Cir. 1967).

¹⁷² *Id.*

¹⁷³ See *In re Hoffmann-La-Roche, Inc.*, 587 F.3d 1333, 1336 (Fed. Cir. 2009) (justifying the issuance of the writ, in part, based on the Eastern District of North Carolina’s docket speed); *United States v. Lord*, 542 F.2d 719, 724 (8th Cir. 1976) (“If [the case] were to be retransferred to the Southern District of New York, the most recent statistics of the Administrative Office indicate that it would not likely be reached for trial for at least twenty-five months. If it were retransferred to the District of Columbia . . . it would not likely be reached for trial for at least seventeen months.”).

¹⁷⁴ See *In re Hoffmann-La Roche*, 587 F.3d at 1336 (coupled with access to evidence and localized interest concerns); *Lord*, 542 F.2d at 724–25 (coupled with access to evidence concerns). The court in *In re Genentech* recognized the inherently speculative nature of predicting how long it may take a cause of action to reach trial following transfer:

interest in avoiding the unnecessary expense of and lost time of multiple trials on the same facts, cannot stand on its own as justification for the writ.

General Tire & Rubber Co. v. Watkins illustrates the primary judicial economy concern well.¹⁷⁵ General Tire was entrenched in patent litigation with Firestone, Goodyear Tire, and other parties.¹⁷⁶ General had filed a patent infringement action against Goodyear and the United States Rubber Co. in the Northern District of Ohio alleging infringement of Patent No. 2,964,083.¹⁷⁷ After the initial infringement suit had been filed, Firestone and others filed an action in the District of Maryland for declaratory judgment of non-infringement and invalidity of the same patent.¹⁷⁸ Despite assurances from the parties and the court that the Maryland action would be reached and disposed of before the Ohio actions were reached, the Maryland action had still not reached settlement or disposition and the Ohio case was poised for trial.¹⁷⁹ The District of Maryland denied General Tire's motion to transfer venue to the Northern District of Ohio, and on General Tire's petition to the Fourth Circuit for mandamus the court commented that "[w]e are now faced with the fact that . . . both suits will be in the process of trial simultaneously for at least nine months of the coming year involving the same patent and consequently many common issues of fact and law."¹⁸⁰

The Fourth Circuit ruled that the Maryland District Court had abused its discretion in not transferring the declaratory action to the Northern District of Ohio.¹⁸¹ In explaining its ruling the Fourth Circuit commented that the district court "erred in its failure to weigh the impelling need for efficiency in the administration of our court system against the right of Firestone to continue the trial in a forum which no longer offered to it any convenience"¹⁸² "We are unanimously of the opinion that the case should be transferred . . . in order to prevent an extravagantly wasteful and useless duplication of the time and effort of the federal courts by the simultaneous

We note that this factor appears to be the most speculative, and case-disposition statistics may not always tell the whole story [W]e merely note that when . . . several relevant factors weigh in favor of transfer and others are neutral, then the speed of the transferee district court should not alone outweigh all of those other factors.

In re Genentech, 566 F.3d 1338, 1347 (Fed. Cir. 2009).

¹⁷⁵ *Gen. Tire & Rubber Co.*, 373 F.2d at 362.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 362–63.

¹⁷⁹ *Id.* at 362.

¹⁸⁰ *Id.*

¹⁸¹ *Gen. Tire & Rubber Co.*, 373 F.2d at 368.

¹⁸² *Id.*

trial of two complex and elaborate cases involving substantially the same factual issues.”¹⁸³ Thus, when a district court takes action on a transfer motion that results in gross waste of judicial resources, appellate courts will take a hard look in order to determine the propriety of mandamus.

5. *The Presence of a Valid and Enforceable Contract*

Finally, circuit courts regularly characterize a district court’s failure to give proper consideration in its transfer analysis to a valid and enforceable contract between the parties—in the form of a forum selection clause—as an abuse of discretion, and will issue a writ of mandamus to correct such an abuse.¹⁸⁴ Under *Stewart Organization, Inc. v. Ricoh Corp.*, “[t]he presence of a forum-selection clause . . . will be a significant factor that figures centrally in the district court’s calculus.”¹⁸⁵ Thus, when the party opposing a transfer motion fails to demonstrate that “the contractual forum is sufficiently inconvenient to justify retention of the dispute,” and the trial court still fails to effect transfer to the agreed upon forum, the trial court has abused its discretion, and a writ of mandamus may issue to remedy this abuse.¹⁸⁶

In re Ricoh Corp. is an appropriate example.¹⁸⁷ Stewart filed a breach of contract suit against Ricoh in the Northern District of Alabama.¹⁸⁸ Despite the existence of a forum selection clause indicating that disputes would be litigated in the Southern District of New York, the Alabama District Court denied Ricoh’s § 1404(a) motion on the basis of its finding that the forum selection clause was unenforceable under Alabama law.¹⁸⁹ After extensive interlocutory appeal on whether state or federal law governed the forum selection clause’s enforceability, and a Supreme Court decision holding that

¹⁸³ *Id.* at 362.

¹⁸⁴ See, e.g., *Sunshine Beauty Supplies, Inc. v. U.S. Dist. Ct. for C.D. Cal.*, 872 F.2d 310, 311 (9th Cir. 1989) (failing to consider a forum-selection clause prior to transfer is an error remediable by mandamus); *In re Ricoh Corp.*, 870 F.2d 570, 572–73 (11th Cir. 1989) (district court erred when it ignored the presence of a valid and enforceable forum selection clause in its transfer analysis and such error is remediable by mandamus).

¹⁸⁵ *Stewart Org. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988). In concurrence, Justice Kennedy noted that a forum selection clause should be, “in all but the most exceptional cases,” given controlling weight. *Id.* at 33 (Kennedy, J., concurring); see also *In re Ricoh Corp.*, 870 F.2d at 573 (“[W]hile other factors might ‘conceivably’ militate against a transfer, the clear import of the Court’s opinion is that the venue mandated by a choice of forum clause rarely will be outweighed by other 1404(a) factors.”) (quoting *Stewart Org.*, 487 U.S. at 30).

¹⁸⁶ *In re Ricoh Corp.*, 870 F.2d at 573.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 572.

¹⁸⁹ *Id.*

federal law governed, the Alabama District Court again denied Ricoh's motion to transfer.¹⁹⁰

On Ricoh's mandamus petition, the Eleventh Circuit held that the district court had committed clear abuse of discretion by not giving proper weight to the forum selection clause: "After weighing various factors, the court decided that neither the Manhattan nor the Alabama forum was demonstrably more convenient than the other; the court therefore deferred to the plaintiff Stewart's choice of an Alabama forum We conclude that the district court clearly abused its discretion in so holding."¹⁹¹ The issuance of a writ was appropriate because deferring to the plaintiff's choice of forum in such situations encourages parties to "violate their contractual obligations"¹⁹² when "enforcement of valid forum selection clauses, bargained for by the parties, protects their legitimate expectations and furthers vital interests of the justice system."¹⁹³ Thus, circuit courts will employ the writ of mandamus to correct a trial court's abuse of discretion when it fails to give proper consideration to the existence of a forum selection clause.¹⁹⁴

B. *The Five Interests and Patent Litigation*

Many of the cases in which mandamus has issued in review of a district court's exercise of discretion on a transfer order have been patent cases as this area of the law has proved to be most apt to produce facts warranting the issuance of the writ.¹⁹⁵ From December 2008 to January 2010 the Federal Circuit heard no less than seven patent cases involving mandamus review of transfer orders for abuse of discretion.¹⁹⁶ It is not surprising, however, that

¹⁹⁰ *Id.* For the Supreme Court opinion see *Stewart Org. v. Ricoh Corp.*, 487 U.S. 22 (1988).

¹⁹¹ *In re Ricoh Corp.*, 870 F.2d at 572-73.

¹⁹² *Id.* at 573.

¹⁹³ *Stewart Org. v. Ricoh Corp.*, 487 U.S. 22, 33 (1988) (Kennedy, J., concurring).

¹⁹⁴ Another example of a writ issuing under these circumstances is *Sunshine Beauty Supplies, Inc. v. United States District Court for the Central District of California*. 872 F.2d 310 (9th Cir. 1989). *Sunshine Beauty Supplies*, however, may be considered an error-of-law case because the district court did not only fail to give proper weight to the forum selection clause, but it failed to consider it at all. *Id.* at 311. Thus, this case can be taken either as an abuse of discretion case, for the same reasons as *In re Ricoh*, or as an error-of-law case where the judge failed to consider one of the transfer factors. See *supra* notes 191-93 and accompanying text.

¹⁹⁵ See, e.g., *In re TS Tech USA Corp.*, 551 F.3d 1315 (Fed. Cir. 2009); *In re Genentech*, 566 F.3d 1338 (Fed. Cir. 2009); *In re Hoffmann-La Roche*, 587 F.3d 1333 (Fed. Cir. 2009); *In re Nintendo Co.*, 589 F.3d 1194 (Fed. Cir. 2009).

¹⁹⁶ See *supra* note 195; see also *In re VTech Commc'ns, Inc.*, Misc. No. 909, 2010 WL 46332 (Fed. Cir. Jan. 6, 2010); *In re Tellular Corp.*, 319 Fed. App'x 989 (Fed. Cir.

the majority of writs redressing abuse of discretion on transfer orders issue in the patent context.¹⁹⁷ This result is a function of the increased forum-shopping that characterizes the world of patent litigation.¹⁹⁸

There are a number of reasons why forum-shopping exists in the patent world on a level not present in other subsets of civil litigation. A few districts have local rules designed to facilitate speedy patent litigation.¹⁹⁹ These rules focus on disclosure, which under the rules takes place early and often, and on claim construction.²⁰⁰ Districts with these special patent rules have accordingly become known as patent “rocket dockets” for the speed at which

2009); *In re Volkswagen of Am., Inc.*, 566 F.3d 1349 (Fed. Cir. 2009). Not surprisingly, all seven cases were originally filed in the Eastern District of Texas. As is discussed *infra*, this result is due to both the Fifth Circuit’s liberal view on mandamus review of transfer orders for abuse of discretion and the fact that the Eastern District of Texas is a much sought after patent forum. Regarding forum shopping in the Eastern District of Texas see Andrew DiNovo & Michael Smith, *The New Spindletop—the Patent Litigation Boom in the Eastern District of Texas* (Intellectual Prop. Law Section, State Bar of Tex.), Winter 2006, at 5, available at http://www.texasbariplaw.org/newsletters/newsletter_winter2006.pdf. The Eastern District of Texas is particularly attractive to plaintiffs in patent cases because of the strict local patent rules. See Alisha Kay Taylor, Note, *What Does Forum Shopping in the Eastern District of Texas Mean for Patent Reform?*, 6 J. MARSHALL REV. INTELL. PROP. L. 570, 572 (2007); see also General Order 05-8, Adopting Uniform Patent Rules (E.D. Tex. 2005), available at <http://www.txed.uscourts.gov/Rules/GeneralOrders/GeneralOrders.htm>.

¹⁹⁷ Other contexts in which the writ has recently issued are products liability and employment discrimination. See *Volkswagen II*, 545 F.3d 304 (5th Cir. 2008) (en banc) (products liability); *In re Horseshoe Entm’t*, 337 F.3d 429 (5th Cir. 2003) (employment discrimination).

¹⁹⁸ See *BBC Int’l Ltd. v. Lumino Designs, Inc.*, 441 F. Supp. 2d 438, 443 (E.D.N.Y. 2006) (recognizing that the federal courts have detected a “high degree” of forum shopping in patent cases). See generally Yan Leychkis, *Of Fire Ants and Claim Construction: An Empirical Study of the Meteoric Rise of the Eastern District of Texas as a Preeminent Forum for Patent Litigation*, 9 YALE J. L. & TECH. 193 (2007) (discussing the factors that incentivize forum shopping by patent plaintiffs).

¹⁹⁹ See, e.g., Eastern District of Texas, General Order 05-08, Adopting Uniform Patent Rules (E.D. Tex. 2005), available at <http://www.txed.uscourts.gov/Rules/GeneralOrders/GeneralOrders.htm>; Northern District of California, Patent Local Rules, available at [http://www.cand.uscourts.gov/cand/LocalRul.nsf/fec20e529a5572f0882569b6006607e0/5e313c0b7e4cd680882573e20062dbcf/\\$FILE/Pat4-10.pdf](http://www.cand.uscourts.gov/cand/LocalRul.nsf/fec20e529a5572f0882569b6006607e0/5e313c0b7e4cd680882573e20062dbcf/$FILE/Pat4-10.pdf); Northern District of Georgia, Patent Rules, available at <http://www.gand.uscourts.gov/pdf/NDGARulesPatent.pdf>; Western District of Pennsylvania, Patent Rules, available at <http://www.pawd.uscourts.gov/Documents/Forms/LocalPatentRules.pdf>.

²⁰⁰ See Leychkis, *supra* note 198, at 209.

the patent cases move to termination.²⁰¹ Other factors incentivizing patent plaintiff forum-shopping are plaintiff-friendly juries and judges experienced in patent litigation.²⁰²

Forum-shopping by patent plaintiffs has been recognized as a national problem, and curbing the practice was one of the motivations behind the Federal Courts Improvement Act of 1982 which established the United States Court of Appeals for the Federal Circuit.²⁰³

Patent litigation long has been identified as a problem area, characterized by undue forum-shopping and unsettling inconsistency in adjudications. Based on the evidence it compiled during the course of thorough hearings on the subject, the Commission on Revision of the Federal Court Appellate System—created by Act of Congress—concluded that patent law is an area in which the application of the law to the facts of a case often produces different outcomes in different courtrooms in substantially similar cases. As a result, some circuit courts are regarded as “pro-patent” and other[s] “anti-patent,” and much time and money is expended in “shopping” for a favorable venue. In a Commission survey of practitioners, the patent bar reported that uncertainty created by the lack of national law precedent was a significant problem; the Commission found patent law to be an area in which widespread forum-shopping was particularly acute.²⁰⁴

The creation of the Federal Circuit Court of Appeals seems to have effectively increased the consistency of patent law, as there is now one single forum for patent appeals.²⁰⁵ It, however, has not prevented patent plaintiffs from filing suit in strategic venues with few, or no, connections to the case in order to benefit from desirable local rules, experienced judges, or open-handed juries.²⁰⁶ This forum-shopping that remains, therefore, increases the likelihood that the forum chosen by the plaintiff will be inconvenient to the defendant and the witnesses—the location of the court with the most favorable patent rules may not be anywhere near the location of the witnesses or evidence—and will thus cause the defendant to file a motion to transfer

²⁰¹ In the Eastern District of Texas, patent cases tried to a judge take, on average, 22.3 months as compared to a 37.8 month nationwide average; patent cases tried to a jury take 21.1 months in the Eastern District as opposed to 27.1 months nationwide. *Id.*

²⁰² *Id.* at 206, 210.

²⁰³ See Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 (1982).

²⁰⁴ H.R. REP. NO. 97-312, at 20–21 (1981) (footnotes omitted); see also S. REP. NO. 97-275, at 5 (1981).

²⁰⁵ See *Serco Servs. Co. v. Kelley Co.*, 51 F.3d 1037, 1040 (Fed. Cir. 1995) (“The creation of this court has in large part tempered the impact of traditional forum shopping in patent cases . . .”).

²⁰⁶ See Leychkis, *supra* note 198, at 206.

venue. If the defendant's motion is denied, his best recourse is to petition the Federal Circuit for a writ of mandamus.

When entertaining a petition for mandamus in review of a transfer order, the Federal Circuit does not apply precedent from that court, but rather the law of the regional circuit because the petition does not contain substantive issues of patent law.²⁰⁷ Thus, when a defendant's motion to transfer venue under § 1404(a) is denied by the Eastern District of Texas, for example, and the defendant petitions the Federal Circuit for a writ of mandamus, the Federal Circuit will apply the Fifth Circuit law on point.²⁰⁸ This is significant because the post-*Volkswagen II* Fifth Circuit has the most liberal position regarding when the writ of mandamus may issue to redress an abuse of discretion on a transfer order.²⁰⁹ Thus, the combination of heavy forum-shopping resulting in the filing of many cases with weak ties to the Eastern District and liberal mandamus review in the Fifth Circuit creates an environment in which the writ often issues in review of a district court's transfer decision.

The simple fact that the writ of mandamus has issued in review of transfer orders with more frequency in the patent context than in other subsets of civil litigation, however, does not render the interests cited by the Federal Circuit when issuing the writ—the same five interests as are identified in the preceding subsection of this Note—inapplicable to other forms of civil litigation.²¹⁰ The interests that drive the Federal Circuit's

²⁰⁷ *Storage Tech. Corp. v. Cisco Sys., Inc.*, 329 F.3d 823, 836 (Fed. Cir. 2003).

²⁰⁸ *See, e.g., In re TS Tech USA Corp.*, 551 F.3d 1315, 1319 (Fed. Cir. 2009) (applying Fifth Circuit precedent to a petition for mandamus in a patent case originating in the Eastern District of Texas).

²⁰⁹ The Fifth Circuit reviews transfer orders for clear abuse of discretion leading to a patently erroneous result. *See Volkswagen II*, 545 F.3d 304, 310 (5th Cir. 2008) (en banc). To determine if the standard is met, the court carefully reviews the facts and circumstances presented to, and the decision-making process engaged in by, the district court in coming to its decision on the transfer motion. *Id.* at 312. Other circuits will not undertake an independent review of the transfer factors considered by the district court due to concerns that such a practice will result in the circuit court substituting its judgment for that of the district court on a decision where the district court is granted much discretion. *See McGraw-Edison Co. v. Van Pelt*, 350 F.2d 361, 363 (8th Cir. 1965) (asserting that the Eighth Circuit would not review the specific decision-making process of the district court on a transfer motion unless it was made clear that the facts and circumstances were "without any basis for a judgment of discretion").

²¹⁰ This is made abundantly clear by the non-patent cases in which the writ of mandamus has issued to remedy a district court's transfer order abuse of discretion. The same interests cited in the patent cases are cited in those cases as well. *See, e.g., In re Horseshoe Entm't*, 337 F.3d 429, 433–34 (5th Cir. 2003) (citing the location of evidence and the convenience of witnesses as bases for issuing the writ in an employment discrimination case).

recent analysis, therefore, are at their core, trans-substantive. As the *TS Tech* court noted in its discussion reversing the district court's disposition on one of the above-identified interests, "[t]he fact that this is a patent case as opposed to another type of civil case does not in any way make the district court's rationale more logical" ²¹¹

The five interests identified in this section provide a principled answer, regardless of the substantive context in which the litigation is situated, to the question: "When is mandamus appropriate to review a trial court's exercise of discretion on a transfer motion?" In nearly every case in which a circuit court has issued a writ to remedy a trial court's transfer order abuse of discretion, at least one of the five interests is cited as justification for the writ. If mandamus review is appropriate to protect these interests in one circuit, there is no reason why it should not be appropriate in all circuits. ²¹² The five interests, therefore, constitute a core nucleus of triggering events that, when present, provoke mandamus review of transfer orders for abuse of discretion.

IV. A PROPOSAL FOR TRANS-JURISDICTIONAL AVAILABILITY OF REVIEW

The interests historically guarded by mandamus review of transfer orders for abuse of discretion bring some measure of coherence to the currently chaotic law regarding the availability of such review. Based upon this newly identified coherence, the present section proposes statutory language providing for trans-jurisdictional availability of review when those, and similarly important interests, are implicated by a ruling of a district court on a transfer motion.

A. Statutory Triggers: Providing Trans-Jurisdictional Mandamus Review of § 1404(a) Orders for Abuse of Discretion

The interests commonly protected by the circuit courts on mandamus review of transfer orders are protected for a reason: they are important. If a party cannot access evidence due to the venue in which it is forced to litigate, it is deprived of the opportunity to put on its best case. ²¹³ For the witnesses, testifying in a case in which they are not a party is, at least, a minor

²¹¹ *In re TS Tech*, 551 F.3d at 1321.

²¹² None of the interests are, for example, geographically dependant. Access to evidence is just as vital in the First Circuit as it is in the Fifth, and the need for a community to have contacts with the litigation located within it is just as great in the Third Circuit as it is in the Tenth.

²¹³ See *supra* Part III.A.1 and accompanying notes.

inconvenience; when the trial is located in a distant venue, testifying becomes a major, life-disrupting event.²¹⁴ Trials in venues with no meaningful connection to the litigation, at best, impose unfair costs on the community, and, at worst, result in panels of disinterested, apathetic jurors.²¹⁵ Facilitating judicial economy and preventing delay have long been recognized as important goals of the federal courts.²¹⁶ And, the ability to enter into bargains knowing that, if properly formed, they will be recognized and enforced by the courts is central to American law.²¹⁷ In the absence of mandamus review for abuse of discretion, these interests, when given short-shrift by a district judge on a transfer ruling, go unvindicated.²¹⁸

Not only does mandamus review of § 1404(a) orders for abuse of discretion protect important interests, but it also reflects the ever-increasing importance of pre-trial litigation in the life cycle of the lawsuit.²¹⁹ Because most disputes are resolved without a trial, the events and rulings leading up to the termination of the case—whether by settlement, dismissal, or otherwise—are necessarily more influential in the outcome of the case.²²⁰ It follows, then, that an abuse of discretion during the pre-trial phase is also more debilitating to an affected party.²²¹ Thus, judicial practice and policy

²¹⁴ See *supra* Part III.A.2 and accompanying notes.

²¹⁵ See *supra* Part III.A.3 and accompanying notes.

²¹⁶ See *supra* Part III.A.4 and accompanying notes.

²¹⁷ See *supra* Part III.A.5 and accompanying notes.

²¹⁸ See *supra* note 15 and accompanying text; see also David E. Steinberg, *Simplifying the Choice of Forum: A Response to Professor Clermont and Professor Eisenberg*, 75 WASH. U. L.Q. 1479, 1494–96 (1997) (“[T]ransfer decisions are virtually immune from appellate review. District judges may decide transfer motions free from worries about reversal, and need not justify their transfer rulings in comprehensive opinions.”).

²¹⁹ See Steinberg, *supra* note 218, at 1506–08 (lamenting the “change in focus from trial adjudication to pre-trial resolution”).

²²⁰ See *Doe v. Tangipahoa Parish Sch. Dist.*, 494 F.3d 494, 511 (5th Cir. 2007) (noting the importance of pre-trial orders especially in light of FED. R. CIV. P. 16(e), which states that pre-trial orders “shall control the subsequent course of the action unless modified by a subsequent order”). Though Rule 16(e) applies to all pre-trial orders, it aptly illustrates the increased importance of a transfer order under § 1404(a) in a pre-trial focused climate. Such an order “controls” the course of the subsequent action. It determines where the case will be litigated, who will hear it, the relative convenience of the parties and witnesses, and the burden imposed on the local community. The importance of pre-trial orders cannot be overstated. See *supra* note 6 and accompanying text (pre-trial transfer of venue orders are potentially outcome-determinative).

²²¹ It is true that many of the factors considered in the transfer context seem to contemplate harms suffered only at trial. For example, what difference does it make if the witnesses are available to testify live in the courtroom rather than by deposition if there is no trial? It may be asked, then, if there is likely to be no trial and the case will settle out,

should reflect the reality of modern litigation and recognize expanded review of pre-trial orders. Specifically, transfer orders issued under § 1404(a) should be subject to mandamus review when it is alleged that the district judge abused her discretion in making the order.²²²

The interests weighing in favor of liberal mandamus review must, however, be balanced against the interests militating in favor of restrictive use of the writ in the transfer context. The classic arguments against mandamus review of transfer orders for abuse of discretion have been policy arguments relating to the avoidance of piecemeal appellate review and the need to adhere to the final judgment rule.²²³ The Supreme Court, in *Allied*

why should an abuse of discretion on a transfer factor contemplating trial matter? See *supra* note 4. Isn't this just fighting over where the case will be sent to settle or otherwise be disposed of without trial? No. The prospect of success at trial drives settlement. See *Rivera v. Corporate Receivables, Inc.*, 540 F. Supp. 2d. 329, 334 (D. Conn. 2008) (noting that in settlement negotiations the parties balance the risk and costs of the litigation against the likelihood of success at trial). Thus, because venue significantly influences a party's prospects of trial success, the terms of settlement will reflect the outcome of the venue dispute—an outcome that may be determined by a judge's abuse of discretion on a transfer motion. See *Clermont & Eisenberg, supra* note 6, at 1508 (“When the dust settles, the case does too—but on terms that reflect the results of the skirmishing [over venue].”).

²²² One characteristic of transfer orders that sets them apart from other pre-trial orders and makes them especially worthy of review is that they are both potentially outcome determinative and effectively unappealable. See *Kasey v. Molybdenum Corp. of Am.*, 408 F.2d 16, 20 (9th Cir. 1969) (commenting that abuses of discretion on transfer orders are not susceptible to correction on appeal from final judgment); *Clermont & Eisenberg, supra* note 6, at 1511–12 (arguing that transfer orders significantly influence outcome).

²²³ See *In re Josephson*, 218 F.2d 174, 180 (1st Cir. 1954) (mandamus review harms efficiency); *All States Freight v. Modarelli*, 196 F.2d 1010, 1011–12 (3d Cir. 1952). Judge Goodrich's opinion in the latter case is the classic articulation of the potential harms of mandamus review of transfer orders for abuse of discretion. He opined that:

Instead of making the business of the courts easier, quicker and less expensive, we now have the merits of the litigation postponed while appellate courts review the question [of] where a case may be tried.

Every litigant against whom the transfer issue is decided naturally thinks the judge was wrong. It is likely that in some cases an appellate court would think so, too. But the risk of a party being injured either by the granting or refusal of a transfer order is, we think, much less than the certainty of harm through delay and additional expense if these orders are to be subjected to interlocutory review by mandamus.

Id. Judge Goodrich's point is well taken. However, the encouragement of efficiency in the federal courts does not require a blanket prohibition on mandamus review under these circumstances. It requires only that such review be reserved for truly deserving cases. Judge Goodrich, after all, would surely not sanction the blatant devaluation of parties' rights in order to preserve efficiency in all situations.

Chemical Corp. v. Daiflon, Inc., colorfully described its restrictive stance on mandamus review of interlocutory orders by describing the frequency with which writs of mandamus would issue with the refrain, “What never? Well, *hardly* ever!”²²⁴

It is undeniable that piecemeal appeal should be, if possible, avoided, and that such a policy promotes efficiency within the federal courts.²²⁵ However, there is nothing talismanic about efficiency considerations, and such considerations should acquiesce to a subordinate position in the hierarchy of policies when in conflict with the reviewability of a potentially outcome-determinative pre-trial order. Thus, the proposed statutory language attempts to provide meaningful review of transfer orders for abuse of discretion while minimizing the dilatory effect of the proposed review.

A statute is the most appropriate method by which to ensure consequential review of orders made under § 1404(a) for abuse of discretion for several reasons. First, the past half-century has proved that the circuit courts are not likely to come into line with one another on the availability of mandamus review.²²⁶ Second, it is equally unlikely that the Supreme Court will issue a decision addressing the issue any time soon; the Court has avoided the issue each of the last two opportunities it has had to consider it, most recently in 2009.²²⁷ Finally, a statute will provide trans-jurisdictional uniformity in an unsettled area of the law, thus reducing the costs imposed on parties litigating petitions for mandamus.²²⁸

²²⁴ The phrase “What never! Well, *hardly* ever!” is used in the per curium opinion of the Supreme Court in *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980) (discussing, generally, the use of the writ of mandamus to review the discretionary decisions of trial courts). However, the phrase finds its origins in Gilbert and Sullivan’s opera *H.M.S. Pinafore*. See W.S. GILBERT & ARTHUR SULLIVAN, *No. 4 Recit. & Song “My Gallant Crew, Good Morning . . . I Am the Captain of the Pinafore”* in H.M.S. PINAFORE (1878), available at http://math.boisestate.edu/gas/pinafore/web_opera/pin04.html.

²²⁵ See *Cunningham v. Hamilton Cnty.*, 527 U.S. 198, 203–04 (1999) (citing *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981)) (allowing piecemeal appeal, among other things, inhibits efficient judicial administration).

²²⁶ See *supra* notes 102–05 and accompanying text (detailing the drastic circuit split that currently exists on the availability of mandamus to review transfer orders for abuse of discretion).

²²⁷ See *Singleton v. Volkswagen of Am., Inc.*, 129 S. Ct. 1336 (2009) (mem.) (denial of petition for writ of certiorari); *Norwood v. Kirkpatrick*, 349 U.S. 29, 33 (1955).

²²⁸ A statute governing the availability of mandamus review of transfer orders for abuse of discretion will cause the costs of bringing a mandamus petition seeking such review to decrease because it will bring clarity to this area of the law. Fewer man-hours will be required to determine what the law on point actually is, and what the appropriate course of action is in light of that law. See Michelle J. White, *Legal Complexity and Lawyers’ Benefit from Litigation*, 12 INT’L. REV. L. & ECON. 381, 382, 386 (1992)

The following statutory language achieves the goals set out above:

- (a) When it appears from the face of the record and the pleadings in support of the petition for a writ of mandamus that as a result of a trial court's grant or denial of a motion to transfer venue under § 1404(a) of this Title:

- (1) One or more parties is substantially prejudiced in its ability to access important sources of proof; or
- (2) The non-party witnesses are substantially inconvenienced by the ruling; or
- (3) The locality of the litigation has little or no meaningful contacts with the controversy; or
- (4) The efficient operation of the federal courts is unnecessarily hindered; or
- (5) A valid and enforceable contract between the parties is rendered inconsequential; or
- (6) The interests of justice so require

the Circuit Court shall inquire into the particular facts and circumstances considered by the trial court in granting or denying the motion to transfer, and if upon such inquiry, the Circuit Court finds that the District Court clearly abused its discretion so as to produce a patently erroneous result, and upon a showing by the petitioner that petitioner has no other means to attain the relief desired, a writ of mandamus vacating the order of transfer or, in the alternative, a writ of mandamus compelling transfer, shall issue.²²⁹

This proposed statute should be located in Chapter 133 of Title 28 of the United States Code and entitled "Writ Review of Transfer Orders." Chapter 133 is entitled "Review—Miscellaneous Provisions."²³⁰ Under that Title and Chapter, this statute would be § 2114. This is the most natural placement of the statute within the Code. Other locations considered for the new section were § 1291, § 1292(b), and § 1651.

The final judgment rule contained in § 1291 concerns general appellate jurisdiction whereas the proposed statute addresses the mandamus jurisdiction of the circuit courts.²³¹ It would be confusing to mix two

(arguing that less clarity in the law increases legal complexity and that legal complexity drives up legal fees).

²²⁹ Though this statute adopts the scope and standard of review of the Fifth Circuit, it does so for illustrative purposes only. See *Volkswagen II*, 545 F.3d 304, 309–10 (5th Cir. 2008) (en banc). As is noted, *supra* page 37, this Note is primarily concerned with the question of when mandamus review should be available, and leaves the formulation of the proper scope and standard of review for another day.

²³⁰ See 28 U.S.C. ch. 133 (2006).

²³¹ See 28 U.S.C. § 1291 (2006).

different bases for jurisdiction in one statute. Thus, amending the final judgment rule with this language is not the best choice. Additionally, § 1292(b) is not an appropriate section to amend for these purposes; that section requires certification by a district judge that the interlocutory order contains a controlling matter of law before interlocutory review will take place.²³² Regardless of the importance of the transfer order in the overall outcome of the trial, an alleged abuse of discretion on such an order is not a “controlling matter of law” in terms of the overall case, and it is unlikely that a district judge would admit to abusing her discretion for purposes of interlocutory appeal.²³³ Likewise, § 1651 is not appropriate. It is a general power statute, and would only be cluttered by a provision dealing with the use of the writ in a specific circumstance.²³⁴ Thus, this statute seems to fit most soundly in the Miscellaneous section. The citation of the proposed statute would therefore be 28 U.S.C. § 2114.

This statute improves upon the current state of mandamus review of transfer orders for abuse of discretion in several important ways. Most importantly, it expressly provides for the availability of writ review if the petitioning party makes the threshold showing. As long as the party petitioning for the writ demonstrates that the ruling of a district court on a transfer motion caused one of the enumerated injuries, the circuit court will undertake to review the decision of the district court on the underlying transfer motion. Currently, at least one circuit will not even grant leave to petition for mandamus when what is claimed is that the district court abused its discretion in ruling on a transfer motion, and a number of circuits refuse to review the discretion of the trial judge where she has considered the statutorily prescribed factors and decided thereon.²³⁵ Such restrictive policies preclude the appellate courts from ever reaching the abuse of discretion question. Thus, this statute creates a path to review that, depending on the circuit, does not currently exist for parties injured by the decision of a district judge on a transfer motion.

The open-ended “interests of justice” threshold factor significantly contributes to this statute’s ability to provide expanded review of transfer orders for abuse of discretion because it provides the needed review in circumstances not readily foreseeable, but that nonetheless implicate interests rising to the level of those specifically enumerated in subsections (1) – (5) of

²³² See 28 U.S.C. § 1292(b) (2006).

²³³ *Id.*; see also Roedersheimer, *supra* note 14, at 117.

²³⁴ 28 U.S.C. § 1651 (2006).

²³⁵ See *In re Josephson*, 218 F.2d 174, 183 (1st Cir. 1954) (denying leave to file petition except in “really extraordinary situations”); *All States Freight v. Modarelli*, 196 F.2d 1010, 1012 (3d Cir. 1952) (refusing mandamus review where the district judge has considered the statutory transfer factors and made a decision).

the statute. Thus, for example, though not expressly stated as a threshold factor in the statute, if the ruling of a district court resulted in the transfer of an action to a venue where one of the parties clearly could not receive a fair and unbiased trial, the "interests of justice" threshold factor would be met: the ruling of the district court on a transfer motion resulted in the impairment of a party's important interest.²³⁶

Proposed § 2114 not only provides for much needed review of transfer orders for abuse of discretion, but it does so while minimizing the damage and delay imposed on the federal courts by piecemeal appeal. The "triggering events" function as a screening mechanism that precludes access to mandamus review where no real injury resulted from the ruling of the district court. Moreover, the screening mechanism is highly selective as these "triggering events" represent a relatively narrow set of circumstances that will end in mandamus review of a transfer order. The "interests of justice" factor does not significantly expand the circumstances that will provoke review because that factor encompasses only interests that are as or more substantial than the expressly defined "triggering events." The proposed statute, therefore, provides review only when it is needed most—when a litigant has already suffered injury at the hands of the court and the injury is clearly discernable.²³⁷ Proposed § 2114, therefore, may open wider the door for mandamus review of transfer orders for abuse of discretion, but it does not open the floodgates.

Nevertheless, it is true that the petition for mandamus will inject an additional step into the litigation process and cause the case on the merits to be postponed, but some delay must be tolerated in order to protect the interests of all parties and ensure the fair adjudication of their rights.²³⁸ As

²³⁶ In one case the petition for a writ of mandamus to vacate an order transferring a securities action from the Western District of Washington to the District of Arizona was denied because the district judge did not clearly err in determining that, due to the fact that the case was highly publicized and political, one of the parties could not receive a fair trial in the original forum. It may be inferred from this case that had the district judge refused to transfer the case from the prejudicial forum, mandamus would have been appropriate to protect the party's interest in receiving a fair and unbiased trial. *See Wash. Pub. Utils. Grp. v. U.S. Dist. Ct. for W.D. Wash.*, 843 F.2d 319, 324 (9th Cir. 1987) ("A decision whether a change of venue is compelled by pervasive prejudicial publicity concerns an exercise of discretion."); *see also L.A. Mem'l Coliseum Comm'n v. NFL*, 726 F.2d 1381, 1399–1400 (9th Cir. 1984) (declining to reverse a trial court's denial of transfer due to pretrial publicity in the forum).

²³⁷ The injury must be "clearly discernable" because the proposed statute requires that injury be clear from the face of the record and the pleadings in support of the petition for mandamus. *See* proposed § 2114, *supra* Part IV.A.

²³⁸ If mandamus review were to be made available for all transfer orders, the machinery of the federal courts would surely grind to a halt. *See* Brief of Civil Procedure Law Professors, *supra* notes 24–27. Proposed § 2114, however, provides mandamus

was previously noted, it is unlikely that the case will ever be adjudicated on the merits.²³⁹ It will most likely settle or be dismissed, and the venue in which the litigation is located substantially influences those methods of case termination.²⁴⁰ Modest delay, therefore, is a small price to pay for thoughtful review of a potentially outcome-determinative order.²⁴¹

B. *Tripping the Triggers: Illustrating the Operation of the Proposed Statute*

The proposed statute provides for automatic mandamus review when the party petitioning for mandamus makes the required threshold showing.²⁴² If just one of the “triggers” enumerated in the statute is tripped, the appellate court will take a closer look at the decision of the district court on the transfer order to determine whether an abuse of discretion warranting the issuance of the writ has occurred.²⁴³ The impact of this statute is most easily appreciated when the statute is applied to the facts of several cases in which mandamus has been petitioned for and denied.

The proposed statute will have little effect on cases such as *Solomon v. Continental American Life Insurance Co.* and those like it.²⁴⁴ In *Solomon*, the plaintiffs petitioned the Third Circuit for a writ of mandamus to vacate the

review only in narrowly defined circumstances historically demonstrated to provoke the issuance of the writ. See *supra* Part III.A.1–5; proposed § 2114 *supra* Part IV.A. Thus, because only the most appropriate facts will be reviewed under the proposed statute, little delay will actually result.

²³⁹ See generally BURNS, *supra* note 4 (detailing the disappearance of the American civil trial).

²⁴⁰ See *supra* note 6.

²⁴¹ Whether the delay associated with mandamus review of transfer orders for abuse of discretion is worth the benefit realized from such review is dependant upon whether, in most cases, “the benefits of closer appellate scrutiny” outweigh “those of greater deference.” See Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 756 (1982). Because transfer orders under § 1404(a) have the potential to substantially influence the outcome of the case by placing the litigation in a certain venue, the delay associated with mandamus review of these orders for abuse of discretion is acceptable where the threshold factors of proposed § 2114 have been met, indicating that some injury has resulted due to the ruling of the trial judge.

²⁴² See proposed § 2114 *supra* Part IV.A.

²⁴³ The scope and standard of review employed on this “closer look” will ultimately determine whether or not the writ will issue. Though this Note does not undertake to discuss the intricacies of these issues, I am an advocate of the Fifth Circuit’s approach as to both scope and standard of review in this context because it provides the most meaningful and probative review possible while not slipping into full de novo review. See *supra* notes 106–07, 229.

²⁴⁴ *Solomon v. Continental Am. Life Ins. Co.*, 472 F.2d 1043 (3d Cir. 1973).

order of a district judge transferring the action under § 1404(a) from the District of New Jersey to the Middle District of North Carolina.²⁴⁵ The Third Circuit did not engage in extensive mandamus review, and denied the petition of the plaintiffs on grounds that “the transfer order falls well within any conceivable standard for review on a mandamus petition of a § 1404(a) order.”²⁴⁶

The court was correct not to engage in extended mandamus review.²⁴⁷ The plaintiffs filed the suit in New Jersey, seeking to recover portions of a life insurance policy providing for double indemnity or accidental death benefits if the insured died as a result of an accident.²⁴⁸ Thus, whether the decedent died as the result of an accident or other causes was the chief issue.²⁴⁹ All of the non-party fact witnesses and nearly all of the evidence relevant to that issue existed in North Carolina: the decedent resided in North Carolina prior to his death, his death occurred in North Carolina, the medical doctor who treated the decedent prior to his death and signed the death certificate resided and practiced in North Carolina, the law enforcement official who investigated the circumstances of the decedent’s death and reported thereon resided in North Carolina, and all other non-party fact witnesses resided in North Carolina.²⁵⁰ The residences of the plaintiffs were the only facts weighing against the transfer.²⁵¹

Applying the proposed statute to the facts would not compel any sort of mandamus review—the plaintiff failed to make the required threshold showing. The transfer did not result in either party suffering prejudice due to inadequate or inconvenient access to evidence; the evidence was located in the venue to which the case was transferred. The non-party witnesses were not inconvenienced; they too were located in North Carolina. The transferee venue had a localized interest in the dispute because the decedent resided and died there. Transferring the action did not threaten any policies of judicial economy or waste judicial resources. No contract between the parties was rendered inconsequential due to the transfer. And, finally, any interests as important as those specifically enumerated in the statute that could have

²⁴⁵ *Id.* at 1044.

²⁴⁶ *Id.* at 1046.

²⁴⁷ In fact, the court would not have engaged in any sort of extensive mandamus review. Under the prevailing Third Circuit rule the court will not review the discretion of the trial judge with mandamus “where the judge in the district court has considered the interests stipulated in the statute and decided thereon.” *See All States Freight v. Modarelli*, 196 F.2d 1010, 1012 (3d Cir. 1952).

²⁴⁸ *Solomon*, 472 F.2d at 1046.

²⁴⁹ *Id.*

²⁵⁰ *Id.* at 1046–47.

²⁵¹ *Id.* at 1047.

triggered the “interests of justice” factor were absent. The proposed statute, therefore, would not change the outcome in cases like *Solomon*. Where it is clear that the threshold factors do not exist, the petition for mandamus will be summarily denied.

The statute would, however, allow circuit courts that presently engage in some level of mandamus review automatically when the petition is filed to more efficiently dispose of petitions that do not meet the threshold requirements. For example, the Seventh Circuit, when a petition for mandamus is filed seeking review of a district court’s exercise of discretion on a transfer motion, will engage in some mandamus review in order to determine whether the district court’s decision was so far beyond the pale of proper judicial discretion as to be usurpative, in violation of a “clear and indisputable legal right,” or patently erroneous such that no other adequate remedy exists.²⁵² Proposed § 2114 would allow the Seventh Circuit and other circuits like it to forego any review at all and simply deny the petition where none of the statute’s factors have been triggered, thus saving the resources of the court.²⁵³

Some cases, however, present circumstances in which proposed § 2114 would compel a result different from that reached by the court that decided the case. *Northern Acceptance Trust 1065 v. Gray* illustrates such a situation.²⁵⁴ In that case the Ninth Circuit, following its rule established in *Kasey v. Molybdenum Corp. of America*,²⁵⁵ refused to engage in mandamus review for abuse of discretion because the district court had considered the statutorily prescribed factors and decided thereon.²⁵⁶ The facts, however, reveal that when the Central District of California ordered the case transferred to the District of Hawaii under § 1404(a), at least one of proposed § 2114’s factors was triggered.

²⁵² See *In re Nat’l Presto Indus.*, 347 F.3d 662, 663 (7th Cir. 2003). For a full discussion of “the proper bounds of judicial discretion,” see the article by Judge Henry J. Friendly, *supra* note 241.

²⁵³ Other circuits that stand to benefit from proposed § 2114 in the same way as the Seventh Circuit because some sort of mandamus review, however limited, is engaged in upon the filing of a petition are the Second, Fourth, Fifth, Sixth, Eighth, Eleventh, and District of Columbia Circuits. The following cases illustrate each circuit’s willingness to engage in some level of review when a petition is filed. See generally *Volkswagen II*, 545 F.3d 304 (5th Cir. 2008) (en banc); *In re Ralston Purina Co.*, 726 F.2d 1002 (4th Cir. 1984); *Roofing & Sheet Metal Servs., Inc. v. La Quinta Motor Inns, Inc.*, 689 F.2d 982 (11th Cir. 1982); *Fine v. McGuire*, 433 F.2d 499 (D.C. Cir. 1970); *A. Olinick & Sons v. Dempster Bros.*, 365 F.2d 439 (2d Cir. 1966); *McGraw-Edison Co. v. Van Pelt*, 350 F.2d 361 (8th Cir. 1965); *Lemon v. Druffel*, 253 F.2d 680 (6th Cir. 1958).

²⁵⁴ See *N. Acceptance Trust 1065 v. Gray*, 423 F.2d 653 (9th Cir. 1970).

²⁵⁵ See *Kasey v. Molybdenum Corp. of Am.*, 408 F.2d 16, 20 (9th Cir. 1969).

²⁵⁶ *N. Acceptance Trust 1065*, 423 F.2d at 654.

Northern Acceptance Trust sued the defendant, Amfac, Inc., in the Federal District Court for the Central District of California alleging violations of the Securities Act of 1933 and the Securities Exchange Act of 1934.²⁵⁷ Amfac filed a motion to transfer venue to the District of Hawaii, and that motion was granted.²⁵⁸ Though there were some factors supporting transfer to Hawaii, the facts did not overwhelmingly support transfer.²⁵⁹ The defendant, Amfac, had substantial business contacts with the Central District of California, some of the meetings of Amfac's board of directors took place in California, and "many third-party witnesses resided in California."²⁶⁰

The fact that the district court in California transferred the action to Hawaii despite the fact that "many third-party witnesses resided in California" triggers mandamus review under proposed § 2114 because the transfer "substantially inconvenienced" many non-party witnesses. Though one may wonder if it is really any "inconvenience" at all to travel to Hawaii for a trial, the potential disruptive effect that the travel may have on the day-to-day life of the witness is just as great as the situation where the witness travels to a less desirable location for litigation.²⁶¹ Thus, proposed § 2114 will compel mandamus review of transfer orders in cases like *Northern Acceptance Trust 1065* where one or more of the statutorily prescribed triggers is tripped, but under the present rule of the circuit no such review is available.²⁶²

²⁵⁷ *Id.* at 653.

²⁵⁸ *Id.*

²⁵⁹ The facts supporting transfer were that the actions that, if proved, would support a violation of the securities laws, allegedly took place in Hawaii; Amfac was incorporated in Hawaii; many of the records and proxy statements of the company were prepared and disseminated in Hawaii; some of the non-party witnesses resided in Hawaii; and the docket of the Hawaii court was lighter. *Id.* at 654 n.3.

²⁶⁰ *Id.*

²⁶¹ Whether witnesses are traveling to Hawaii or Beaumont, Texas, the time away from work, home, and regular employment is an inconvenience for the purposes of § 1404. *See In re Genentech*, 566 F.3d 1338, 1343 (Fed. Cir. 2009).

²⁶² The circuits currently most restrictive with mandamus review of transfer orders for abuse of discretion who, like the Ninth Circuit, would be most affected by proposed § 2114 are the First, Third, Ninth, and Tenth Circuits. The following cases illustrate the restrictive approach to mandamus review in those circuits. *See generally* *Hustler Magazine, Inc. v. U.S. Dist. Ct. for D. Wyo.*, 790 F.2d 69 (10th Cir. 1986); *Kasey v. Molybdenum Corp. of Am.*, 408 F.2d 16 (9th Cir. 1969); *In re Josephson*, 218 F.2d 174 (1st Cir. 1954); *All States Freight v. Modarelli*, 196 F.2d 1010 (3d Cir. 1952).

V. CONCLUSION

The availability of mandamus to review § 1404(a) transfer orders for abuse of discretion has been in turmoil for the past 60 years.²⁶³ The Supreme Court has refused to address the question on multiple occasions,²⁶⁴ and the potpourri of positions taken by the circuit courts has done nothing to bring clarity or consistency to this area of the law.²⁶⁵

This Note suggests that the current discord in the circuits is unnecessary. The writ of mandamus has historically issued when the ruling of a district court on a transfer motion has harmed one of five interests.²⁶⁶ The interests that circuit courts have historically found worthy of protection through the issuance of a writ are: the parties' ability to conveniently access sources of proof, the convenience of the witnesses, the local interest in and connection to the litigation, judicial economy, and the enforcement of an otherwise valid contract between the parties.²⁶⁷ These interests present a theme around which this unsettled area of the law may be organized. One way, therefore, to bring organization and consistency to this area of the law is to statutorily expand the availability of mandamus review for transfer orders where it is alleged that the trial judge abused his discretion when ruling on the transfer motion and one of the five historically protected interests, or an interest of comparable value, is implicated.²⁶⁸ Such a statutory expansion of mandamus review recognizes the potentially outcome-determinative nature of venue in the larger litigation picture as well as the historical practices of the circuit courts while refusing to provide a brand of mandamus review that would significantly impede the operation of the federal courts.

Therefore, proposed § 2114, or a similar statute, should be enacted to ensure that orders issued under § 1404(a) are uniformly reviewable by mandamus for abuse of discretion. Such a statute is a necessary, effective, and minimally intrusive mechanism for supervising the discretion of the district courts exercised on § 1404(a) transfer orders.

²⁶³ See *supra* notes 21–23.

²⁶⁴ See *supra* note 227.

²⁶⁵ See *supra* notes 113–14 (setting out the various positions taken by the circuit courts).

²⁶⁶ See *supra* Part III.A.1–5.

²⁶⁷ *Id.*

²⁶⁸ See *supra* Part IV.A.

